76-1309
No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 545 F.2d 1182. The opinion of the district court (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1976. A petition for rehear-

ing with a suggestion for rehearing *en banc* was denied on January 20, 1977 (App. B, *infra*). On February 10, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is proper to suppress otherwise admissible and probative evidence in a criminal case because of the government's failure fully to comply with an internal regulation that is not required by the Constitution or by statute.

STATUTORY AND OTHER PROVISIONS INVOLVED

18 U.S.C. 3501 provides in relevant part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. * * *
>
> * * * * *
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Paragraph 652.22 of the Internal Revenue Service Manual provides in pertinent part:

> (1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division, cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.
>
> (2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical, electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. * * * Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use.

(3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of person involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] * * *.

* * * *

(6) When emergency situations occur, the Director, or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelegated. * * * Emergency authorizations pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.

(7) If, at the time the emergency approval request is submitted, it is desired that approval for use of electronic equipment be given for an extended period, this should be indicated on the [appropriate form]. The Director, in addition to reporting his authorization for emergency use to the Attorney General, will also request approval for the Use of Electronic Equipment for the duration of that period specified by the requestor.

STATEMENT

1. In March 1974, during an audit by the Internal Revenue Service ("IRS") of respondent's individual

and employment tax returns, respondent proposed a "personal settlement" with Internal Revenue Agent Robert K. Yee (S. Tr. 11).[1] Agent Yee reported the offer to the Internal Security Division of the IRS (S. Tr. 23, 28-29). On January 27, 1975, Agent Yee met with respondent a second time, and respondent renewed his offer (D. Exh. L). On January 30, 1975, Agent Yee telephoned respondent and suggested that they meet on the following day at respondent's office (S. Tr. 15). During that meeting respondent gave Agent Yee $500 to settle the tax investigation in his favor. Agent Yee recorded the events by means of an electronic monitoring device hidden on his person (App. A, *infra*, pp. 2a-3a).

Agent Yee telephoned respondent again on February 5, 1975, and scheduled another meeting for the following afternoon to show respondent an agreement form by which he could accept the agent's calculation of his tax liability (S. Tr. 17-18). That meeting—at which respondent offered Yee $2,000 to audit his income tax returns to respondent's satisfaction—was also monitored and recorded by the agent without respondent's knowledge (App. A, *infra*, pp. 3a-4a).

A third meeting took place on February 11, 1975. It, too, was secretly monitored and recorded by the agent. At that meeting respondent offered Yee an additional $500 to conclude the audit in respondent's favor (App. A, *infra*, p. 4a).

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[1] "S.Tr." refers to the one-volume transcript of the suppression hearing held on December 8, 1975. "D.Exh." refers to defense exhibits.

On February 26, 1975, respondent was indicted in the United States District Court for the Northern District of California on three counts of bribing a federal official, in violation of 18 U.S.C. 201(b) (App. A, *infra*, p. 1a).

2. Prior to trial,[2] respondent moved to suppress the recordings of his conversations with Agent Yee [3] on the ground that they had not been properly authorized under applicable IRS internal regulations governing consensual monitoring of face-to-face conversations between agents and taxpayers.[4] Those regulations require that, except in "exigent circumstances," advance authorization for such monitoring be obtained by designated IRS officials from the Justice Department (IRS Manual ¶ 652.22(1)). "Exigent circumstances" are not defined, but the regulations provide that emergency authorization within the IRS alone "will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General" (IRS Manual ¶ 652.22(6)).

[2] Respondent's first trial ended in a mistrial when the jury was unable to reach a verdict. The motion to suppress was filed before the second trial began.

[3] The telephone conversation on January 30, 1975, as well as telephone conversations between Agent Yee and respondent on January 28 and 29 and February 5 and 13, 1975, were electronically monitored and recorded with Agent Yee's consent. The district court found (App. C, *infra*, p. 17a) that these recordings were made in substantial compliance with pertinent IRS regulations and accordingly denied respondent's motion to suppress them. The admissibility of those recordings is not at issue here.

[4] The IRS regulations were drafted to conform to the Attorney General's October 16, 1972, "Memorandum to the Heads of Executive Departments and Agencies" establishing guidelines for agency self-regulation of the consensual monitoring of conversations during criminal investigations. It required all federal departments and agencies to obtain advance authorization from the Attorney General or any designated Assistant Attorney General before conducting consensual monitoring of non-telephone conversations. Subsequently the memorandum was amended to permit authorization by any designated Deputy Assistant Attorney General as well. (App. A, *infra*, pp. 6a-7a).

The monitoring of the January 31, 1975, meeting had not been authorized by the Justice Department but had been given "emergency approval" by the Director of the IRS Internal Security Division pursuant to paragraph 652.22(6) (S. Tr. 56). A pending request for authorization to monitor the February 6, 1975, meeting had not yet been acted on by the Justice Department when that meeting occurred; the monitoring was again approved on an emergency basis by the Director of the Internal Security Division (*ibid.*). The monitoring of the February 11, 1975, meeting was authorized by the Justice Department as well as by appropriate IRS personnel (S. Tr. 52-54; D. Exh. O).

The district court suppressed all three recordings (App. C, *infra*). It ruled that since Agent Yee had scheduled the date of the first two meetings himself, no bona fide emergency existed to justify the failure to get advance approval from the Justice Department for the monitoring of those meetings (*id.* at 19a-20a). The district court also found (*id.* at 18a) that the February 11 monitoring violated the IRS regulations because it had been authorized by a Dep-

uty Assistant Attorney General rather than by the Attorney General or an Assistant Attorney General.

3. On appeal, the court of appeals reversed the suppression of the February 11 recording, holding that the authorization by a Deputy Assistant Attorney General was not inconsistent with the IRS regulations (App. A, *infra*, pp. 4a-8a). It agreed with the district court, however, that the invocation of emergency authorization procedures for the monitoring of the January 31 and February 6 meetings had not been justified by "exigent circumstances," and it affirmed the suppression of the recordings made of those meetings (*id.* at 8a-9a).

The court acknowledged (App. A, *infra*, p. 10a; citation and footnote omitted) that "[d]uring 'a period of increasing disenchantment with the exclusionary rule,' * * * the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach." It felt bound, however—"[a]bsent a contrary ruling by the Supreme Court or by this court en banc"—by the decision of another panel of the Ninth Circuit in *United States* v. *Sourapas*, 515 F.2d 295, suppressing evidence obtained by an IRS agent who questioned a potential criminal defendant without first giving *Miranda*-type warnings, as required by IRS regulations.

In its order denying the government's petition for rehearing (App. B, *infra*), the court amended its

opinion by adding the following paragraph to the discussion on suppression (App. A, *infra*, pp. 10a-11a):

> Our decision today does not mean that in every instance a deviation from general guidelines governing Executive exercises of discretion will result in the automatic exclusion of evidence. As noted in *United States* v. *Leahey*, 434 F.2d 7, 11 (1st Cir. 1970): "We do not say that agencies always violate due process when they fail to adhere to their procedures." Here, however, the noncompliance by the IRS for the January 31 and February 6 monitorings harmed more than just the "efficiency of the I.R.S. operations." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the courts may properly suppress probative and otherwise admissible evidence of crime because of a failure by a government agency to follow internal regulations that impose upon agency personnel duties not required by the Constitution or by statute.

The regulations at issue here apply to criminal investigatory rather than to administrative adjudicatory functions. There is no way in which respondent could have relied upon them to his detriment, and they conferred no enforceable rights upon him. In our view the failure to follow them is the concern of the Executive Branch alone and provides no occasion for the courts to suppress evidence in a criminal trial. The

effect of applying the exclusionary rule in cases such as this one is to discourage the government from formulating internal rules to govern the conduct of its employees beyond those required by the Constitution or by statute. The issue is both recurring and important to the proper administration of the criminal law. It should be resolved by this Court.

1. The opinion of the court of appeals does not explicitly state the basis upon which it rested its result—*i.e.*, whether it believed suppression was appropriate because the governmental actions in this case violated the Constitution, or whether it acted in the exercise of its supervisory powers.[5] If indeed the court suppressed the evidence in the exercise of its supervisory powers, it erred for the reasons more fully set forth in our pending petition in *United States* v. *Jacobs*, No. 76-1193.[6] The courts of appeals'

[5] The court said (App. A, *infra*, p. 10a; footnote omitted) that "the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach." This statement indicates that the court may have been relying on its supervisory powers, since without a finding that the Constitution or any statute required suppression there would be no other authority for the court's action.

[6] *Jacobs* presents the question whether a court of appeals possesses (and should exercise) supervisory power to suppress allegedly perjurious grand jury testimony for the sole reason that the prosecutor failed to follow the usual circuit-wide practice of giving "target warnings" to grand jury witnesses who are potential defendants. We are sending a copy of our petition in *Jacobs* to respondent.

supervisory powers are limited by relevant Acts of Congress (see, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353, n. 11), and here, as in *Jacobs*, both 18 U.S.C. 3501 and Rule 402 of the Federal Rules of Evidence mandate the admission into evidence of respondent's recorded conversations.[7] Moreover, even absent these controlling statutes, the court's application of supervisory powers to suppress the recordings, where there was "no manifestly improper conduct by federal officials," would be "wholly unwarranted." *Lopez* v. *United States*, 373 U.S. 427, 440. See also *United States* v. *Jones*, 433 F.2d 1176, 1181-1182 (C.A.D.C.), certiorari denied, 402 U.S. 950.

2. The court's reliance on *United States* v. *Sourapas*, 515 F.2d 295 (C.A. 9), *United States* v. *Leahey*, 434 F.2d 7 (C.A. 1), and *United States* v. *Heffner*, 420 F.2d 809 (C.A. 4), indicates that it believed that the Due Process Clause required suppression in this case. Those decisions invoked a due process rationale

[7] Section 3501 provides that "a confession"—defined to mean "any self-incriminating statement"—"shall be admissible in evidence if it is voluntarily given." There is no question that respondent's offers of money in exchange for Agent Yee's favorable disposition of respondent's audit were both "self-incriminating" and "voluntarily given."

Rule 402, Fed. R. Evid., provides that "[a]ll relevant evidence is admissible" except as otherwise provided by the Constitution, by statute, by the Rules of Evidence themselves, "or by other rules prescribed by the Supreme Court pursuant to statutory authority." In enacting this Rule, Congress withdrew from all federal courts save the Supreme Court any power to fashion special rules of evidentiary exclusion, and permitted the Supreme Court to act in this regard only "pursuant to statutory authority."

to suppress incriminating evidence where an IRS investigative agent had failed to precede questioning of a potential criminal defendant with *Miranda*-type warnings, as required by IRS regulations. They in turn relied heavily on *Accardi* v. *Shaughnessy*, 347 U.S. 260, and three other decisions of this Court decided in its wake.[8]

In our view that reliance was misplaced. The issue in *Accardi* was the lawfulness of final agency action taken in disregard of published regulations having "the force and effect of law" (347 U.S. at 265) and governing the essentially adjudicatory procedure for administrative suspension of deportation. In invalidating the agency action, the Court cited (347 U.S. at 265, n. 7) *Bridges* v. *Wixon*, 326 U.S. 135, in which it was said that the administrative procedures promulgated to govern deportation proceedings were "safeguards against essentially unfair procedures" and were designed "to protect the interests of the alien and to afford him due process of law" (*id.* at 152, 153).[9]

[8] *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Yellin* v. *United States*, 374 U.S. 109.

[9] The employment termination cases of *Service* v. *Dulles* and *Vitarelli* v. *Seaton*, *supra*, also involved agency failure to follow procedural regulations intended to guarantee fairness in quasi-adjudicatory administrative proceedings. *Yellin* v. *United States*, *supra*, involved the failure by the House Committee on Un-American Activities to follow rules that by their own terms were required to be distributed to each witness appearing before the Committee (374 U.S. at 121, 123) and explicitly created and held out to those witnesses certain procedural "rights and privileges" (*id.* at 115).

By contrast, the IRS regulation involved in *Leahey*, *Heffner*, and *Sourapas* does not apply to trial-type proceedings and was not promulgated to protect against "essentially unfair procedures" or to afford anyone "due process of law." [10] Cf. *United States* v. *Leonard*, 524 F.2d 1076, 1089 (C.A. 2) (Friendly, J.) (indicating that those decisions would not be followed were the issue to be squarely presented). At least absent a showing by the defendants in those cases that they relied to their detriment on the announced agency policy, due process was not violated by the investigating agents' failure to give *Miranda*-type warnings and the exclusion of relevant evidence was improper.[11]

[10] See *Beckwith* v. *United States*, 425 U.S. 341, holding that statements given by a taxpayer to IRS agents in the course of a non-custodial interview in a criminal tax investigation were admissible in the ensuing criminal prosecution even though the interview had not been preceded by *Miranda* warnings.

[11] Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539, excusing an agency failure to follow its own regulations because "[t]he rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in *Vitarelli* v. *Seaton*, 359 U.S. 535; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Yellin* v. *United States*, 374 U.S. 109." See also *United States* v. *Lockyer*, 448 F.2d 417, 420-421 (C.A. 10), distinguishing *Accardi* as involving "a vital procedural provision"; *National Capital Airlines, Inc.* v. *Civil Aeronautics Board*, 419 F.2d 668, 676-677, n. 12 (C.A.D.C.), certiorari denied, 398 U.S. 908, distinguishing *Accardi* as involving a violation of regulations

But whatever may have been the correct result in those three cases, in the present case there is no conceivable basis on which to predicate a violation of respondent's due process rights. The IRS regulations at issue here, like the guidelines issued by the Attorney General to which they were intended to conform (see note 4, *supra*), were meant simply "to provide some degree of internal governmental supervision over consensual overhearings." *United States* v. *Kline*, 366 F. Supp. 994, 997 (D.D.C.). "[N]o citizen * * * can claim reliance on them," and they "do not have the force or effect of law * * *" (*ibid.*). They are, like the regulations at issue in *Sullivan* v. *United States*, 348 U.S. 170, 173, merely "housekeeping provision[s]." [12] Cf. *United States* v. *Hutul*, 416 F.2d 607, 626-627 (C.A. 7), certiorari denied, 396 U.S. 1012.

Respondent did not know that his conversations were being recorded. *A fortiori*, he did not know that

governing accusatory proceedings that amounted to a denial of due process.

[12] In *Sullivan* the Court refused to dismiss an indictment that was returned on the basis of evidence of violation of the internal revenue laws presented to a grand jury without the prior approval of the Attorney General, as required by an internal Department of Justice regulation. The Court noted that the regulation was never officially promulgated or published in the Federal Register, but was "simply a housekeeping provision of the Department" (348 U.S. at 173). It held that the Assistant United States Attorney who violated the regulation was "answerable to the Department, but [that] his action before the grand jury was not subject to attack by one indicted by the grand jury on [the evidence presented]" (*id.* at 174).

they were being recorded without Justice Department approval. It cannot be suggested that he would have behaved differently had Agent Yee fully complied with the applicable IRS regulations.[13] Cf. *United States* v. *White*, 401 U.S. 745, 752 (plurality opinion). Agency regulations that, observed or not, can have no possible bearing on how an individual under investigation will conduct himself cannot be said to confer any due process rights upon such individuals.[14] See Note, *Violations By Agencies of Their*

[13] Nor can it be suggested that the Justice Department would not have authorized Agent Yee's conduct. The Justice Department and IRS regulations at issue here were designed to permit responsible government officials to control the actions of their subordinates (see *United States* v. *Kline*, *supra*), so that out of the broad class of persons whose conversations with government agents might be recorded without constitutional or statutory restraint, only those persons subject to a legitimate criminal investigation would be monitored. A person suspected of offering a bribe to a public official is clearly a proper subject of criminal investigation, and accordingly Agent Yee's monitoring of respondent's conversations, even though not approved by the Justice Department, did not result in a recording that would not otherwise have occurred. The Justice Department's subsequent approval of the monitoring of the February 11 conversation confirms that the Department officials charged with the government's criminal enforcement effort considered this a case appropriate for monitoring.

[14] No other constitutional or statutory rights of respondent's were violated by the government's conduct in this case. The warrantless monitoring and recording of a conversation to which a consenting government agent is a party is authorized by 18 U.S.C. 2511(2)(c) and has been upheld by this

Own Regulations, 87 Harv. L. Rev. 629, 634-635 (1974); cf. *United States* v. *Bland*, 458 F.2d 1, 7-8 (C.A. 5), certiorari denied, 409 U.S. 843.

3. Since all of respondent's constitutional and statutory rights were respected in this case, suppression of the recordings solely because of the IRS's failure to follow its own internal regulations did not further any of the policies justifying application of an exclusionary rule, and indeed may have worked against them.

The core objective of the exclusionary rule is the deterrence of unlawful government conduct in order to effectuate constitutional guaranties, especially the Fourth Amendment's protection against unreasonable searches and seizures. *United States* v. *Calandra*, 414 U.S. 338, 347. Accord, *e.g.*, *United States* v. *Janis*, No. 74-958, decided July 6, 1976, slip op. 13; *Stone* v. *Powell*, No. 74-1055, decided July 6, 1976, slip op. 18-19; *United States* v. *Peltier*, 422 U.S. 531, 536-539; *Michigan* v. *Tucker*, 417 U.S. 433, 446-447; *Desist* v. *United States*, 394 U.S. 244, 254, n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636-637. Yet "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons" (*Stone* v. *Powell*, *supra*, slip op. 19); in particular, this Court has declined to apply the rule in circumstances where

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Court against challenge under the Fourth Amendment. *United States* v. *White*, 401 U.S. 745, 752-753 (plurality opinion); *Lopez* v. *United States*, 373 U.S. 427, 438-439.

exclusion would have a minimal deterrent effect and would frustrate significant public interests. See, *e.g.*, *United States* v. *Calandra*, *supra*, 414 U.S. at 349, 351; *United States* v. *Janis*, *supra*, slip op. 20; *Michigan* v. *Tucker*, *supra*, 417 U.S. at 447-448.

Even assuming that the exclusionary rule might properly be invoked upon proof of repeated and deliberate violations of agency regulations like those at issue here, so far as the record shows the noncompliance in this case was isolated and accidental.[15] If the exclusionary rule is inapplicable for want of deterrent impact in cases involving constitutional violations, then surely it is inapplicable where its deterrent effect would be negligible and the violation amounted to no more than an inadvertent noncompliance with an internal agency regulation. See *United States* v. *Feaster*, 494 F.2d 871, 875-876 (C.A. 5), certiorari denied, 419 U.S. 1036; *United States* v. *Walden*, 490 F.2d 372, 376-377 (C.A. 4), certiorari denied, 416 U.S. 983.[16] Indeed, the appropriate rem-

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[15] There is no basis for accusing the IRS, which believed in both instances that the situation called for application of the emergency authorization procedures of its regulations, of bad faith in failing to secure Department of Justice approval for the monitoring of the January 31 and February 6 meetings between Agent Yee and respondent.

[16] See *United States* v. *Burke*, 517 F.2d 377 (C.A. 2) (Friendly, J.), refusing to suppress evidence seized pursuant to a warrant that failed to conform to several nonconstitutional requirements of Rule 41, Fed. R. Crim. P. The court said that the exclusionary rule is " 'a blunt instrument, conferring an altogether disproportionate reward not so much

edy for any infraction of regulations here (which did not violate respondent's rights) was a matter for the Executive Branch to determine, not the court of appeals. *Sullivan* v. *United States*, *supra*, 348 U.S. at 174; *United States* v. *Leonard*, *supra*, 524 F.2d at 1089.[17]

Moreover, there are strong countervailing interests that militate in favor of admitting the recordings in this case. The district court did not rule that Agent Yee could not testify at respondent's trial about the alleged bribe offers that occurred on January 31 and February 6, 1975, and we know of no reasons why such testimony would be disallowed. See *United States* v. *White*, *supra*; *Lopez* v. *United States*, *supra*. In these circumstances, suppression of the recordings of those transactions disserves the fact-finding function of the trial, since "[a]n electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent" (*United States* v. *White*, *supra*, 401 U.S. at 753 (plurality opinion)).

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in the interest of the defendant as in that of society at large.' For that reason courts should be wary in extending the exclusionary rule * * * to violations which are not of constitutional magnitude" (*id.* at 386; footnote omitted).

[17] The IRS regulations involved here provide for disciplinary action, including removal from the Service, for employees who knowingly violate those regulations. IRS Manual ¶ 651.1(3).

The more important consideration, however, is that the extension of the exclusionary rule to cases such as this is not only unjustified by the policies underlying the rule, but actually tends to produce results that are contrary to those that the rule seeks to foster. The broad role of the exclusionary rule is to encourage governmental respect for citizens' constitutional and statutory rights. Many voluntarily adopted internal governmental guidelines and regulations have an essentially similar purpose in regard to societal or individual interests that, while significant, are not so fundamental as to command constitutional or statutory protection. Use of the exclusionary rule to punish the government for failing to follow such regulations is less likely to encourage governmental respect for the interests involved than to discourage adoption of such regulations in the first place. The defendant receives "an altogether disproportionate reward" (*United States* v. *Burke*, *supra*, 517 F.2d at 386), yet society receives no offsetting benefit.

Indeed, society suffers twice: criminal prosecutions are impeded, and the government is deterred from adopting rules and practices that go beyond what the Constitution or a statute may require.[18] The wisdom

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[18] The present case is not an isolated instance of this phenomenon. In addition to *Leahey*, *Heffner*, *Sourapas*, and *Jacobs*, *supra*, each one suppressing evidence because the government failed to adhere to an internal regulation or practice, see *United States* v. *Choate*, 422 F. Supp. 261 (C.D. Cal.), excluding evidence of narcotics violations obtained by

of seeking to compel compliance with such internal administrative regulations by means of the coercive sanction of exclusion of relevant evidence in criminal prosecutions is a matter that merits consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
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JEROME M. FEIT,
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Attorneys.

MARCH 1977.

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use of a mail cover that the district court determined had been instituted without adequate compliance with applicable Postal Service regulations.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1091

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ALFREDO L. CACERES, DEFENDANT-APPELLEE

[October 15, 1976]

Appeal from the United States District Court for the Northern District of California

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Before: WRIGHT and SNEED, Circuit Judges, and FITZGERALD,* District Judge.

OPINION

WRIGHT, Circuit Judge:

Appellee was charged with three counts of bribery of an Internal Revenue Service (IRS) agent [18 U.S.C. § 201(b)]. Before trial he moved to suppress, *inter alia*, tape recordings of three face-to-face conversations with IRS agent Yee. The district court

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* Honorable James M. Fitzgerald, United States District Judge of the District of Alaska, sitting by designation.

suppressed the recordings. We affirm in part and reverse in part.

The IRS began to investigate appellee's individual and employment tax returns in March 1974. Yee testified at the suppression hearing that appellee offered a bribe in exchange for settlement of appellee's tax dispute. No further contact occurred between appellee and the IRS until January 1975.

On January 27, 1975, Yee again met with appellee and reported to his superiors that the bribe offer had been renewed. On January 30, in a call initiated by the agent, appellee agreed to meet Yee on the following day. Yee suggested the time. The IRS determined that this face-to-face encounter should be electronically recorded. IRS procedures for obtaining authorization for such surveillance required that in all but "emergency situations" IRS agents obtain approval from named personnel in the Justice Department as well as certain designated officials in their own agency. Internal Revenue Manual (Manual) ¶ 652.22.[1] Although proper IRS approval was obtained for the January 31 surveillance, Justice De-

[1] Paragraph 652.22 provides, in pertinent part:

(1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization

partment approval was not sought. Count I charges that during the meeting on January 31, 1975, appellee gave the IRS agent $500.

On February 5, 1975, Yee scheduled another meeting with appeliee for the following day. Again, the IRS did not seek Justice Department approval for the electronic surveillance conducted. Count II alleges

of the Attorney General in advance. If the Director, Internal Security Division, cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.

(2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. * * * Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use.

(3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of person involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] ....

* * * * *

(6) When emergency situations occur, the Director or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelegated. . . . Emergency authorizations pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.

that at the February 6 meeting appellee offered the agent $2,000 if he would resolve appellee's tax difficulties satisfactorily.

On February 7, 1975, the IRS sought approval from the Justice Department for further electronic surveillance of face-to-face encounters with appellee. IRS procedures required that such approval be obtained from the Attorney General or any designated assistant attorney general. Despite this requirement, approval was given by a *deputy* assistant attorney general.

After receiving Justice Department and IRS authorization, the IRS monitored a meeting between the agent and appellee on February 11, 1975 during which appellee offered the agent an additional $500. This activity formed the basis for Count III.

Two issues are presented: (1) Did the district court correctly conclude that approval for each of the three electronic monitorings was obtained in violation of IRS procedure? (2) Even if some or all of the monitorings were in violation of IRS procedure, did the district court correctly conclude it was necessary to suppress the evidence obtained?

I.

IRS PROCEDURAL REQUIREMENTS

A. *The February 11, 1975 Monitoring*

For the monitoring of February 11, 1975, the IRS agents obtained proper approval from their own organization, and also obtained approval from a deputy

assistant attorney general in the Justice Department. At that time the manual read in pertinent part:

> The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. *This authority cannot be redelegated.* These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. . . .

Manual ¶ 652.22(1). (Emphasis added.)

The district court read the emphasized portion as requiring advance authorization from either the Attorney General or a designated assistant attorney general, without redelegation. The government contends that the district court's interpretation is erroneous, and we agree.

The emphasized sentence prohibiting redelegation relates only to the immediately preceding sentence outlining the procedure for requesting authorization within the IRS. The sentence following that which is emphasized, explaining that "[t]hese same officials may authorize temporary emergency monitoring" without authorization from the Attorney General, clearly refers to IRS officials, not Justice Department officials. Similarly, the words "[t]his author-

ity" in the emphasized sentence must refer only to IRS officials.

This interpretation is supported by analysis of the statutory framework relating to administrative self-regulation of electronic monitoring, and by a review of the pertinent regulatory history. Under 18 U.S.C. 2511(2)(c), electronic monitoring with the consent of one party is not illegal. *United States* v. *Ransom*, 515 F.2d 885, 890 (5th Cir. 1975). There is no need in this case, therefore, to identify the limits of Congressional delegation of the power to specially authorize that which is generally illegal. *See, e.g., United States* v. *Giordano*, 416 U.S. 505, 523 (1974). Rather, we are asked to interpret regulations which have provided procedures for obtaining administrative authority to perform activities which, under the statute, would not be illegal even absent such authorization.

On October 16, 1972, the Attorney General distributed a "Memorandum to the Heads of Executive Departments and Agencies," prescribing principles of agency self-regulation of consensual monitoring of conversations during criminal investigations. It required all federal departments and agencies to obtain advance authorization from "the Attorney General or any designated Assistant Attorney General" before conducting consensual monitoring. The IRS regulations here at issue were drafted to conform to the October 16, 1972 Memorandum. Manual ¶ 652.1(1).

By 1974 the Attorney General had amended these procedures so that advance authorization for consensual monitoring could be obtained from any *deputy* assistant attorney general, as well as designated *assistant* attorneys general and the Attorney General. A.G. Order No. 566-74 (April 25, 1974). The IRS neglected to amend its own regulations to conform to the new Justice Department rules.

It is clear that the Attorney General had the power to promulgate the regulations involved here. *See* 5 U.S.C. § 301. Within this legitimate regulatory framework he was free to delegate such departmental functions as he saw fit. *See* 28 U.S.C. § 510. Since this ability to delegate was exclusive to the Attorney General [28 U.S.C. § 509], the IRS by its own regulation could not affect the Justice Department's delegation scheme.

As amended in 1974, the Justice Department advance authorization scheme was designed to accommodate requests for consensual monitoring made by all executive departments and agencies. It defies logic to suggest that the IRS, by failing to conform its own regulation to the 1974 Justice Department amendment, implicitly required of the Justice Department a different authorization procedure for IRS requests than was established for requests from other departments.

The language of the Manual (¶ 652.22(1)) does not say expressly that authorization by a deputy assistant attorney general would be insufficient or invalid. To infer such conclusion from the wording

would be unreasonable. We hold, then, that the IRS did not fail to comply with its own regulation when it obtained authorization for the February 11, 1975 monitoring from the deputy.

B. *The January 31, 1975 and February 6, 1975 Monitorings*

The IRS failed to obtain authorization from any source in the Justice Department for the January 31 and February 6 monitorings. It argues that the meetings to be monitored on both occasions were scheduled to take place within 48 hours of the request for authorization and, under such "emergency" conditions, the IRS was not required to obtain Justice Department approval. Manual ¶ 652.22(6).[2]

We are not persuaded. It is true that in each instance less than 48 hours remained between initiation of the request for monitoring and the scheduled meeting time. But these "exigencies" were entirely government-created. *Cf. United States* v. *Curran*, 498 F.2d 30, 34 (9th Cir. 1974). There is no reason to believe that the requests could not have been made earlier. The investigation had been going on for some ten months, and the appellee was readily available for questioning during that time.

We need not here decide what constitutes an "emergency situation" warranting departure from the IRS's self-imposed requirement of obtaining advance authorization from the Justice Department. We

[2] *See* note 1 *supra*.

conclude only that the agency must present something more than government-created scheduling problems to justify its failure to follow normal authorization procedures.

II.

SUPPRESSION OF EVIDENCE

A. *Sourapas-Leahey-Heffner*

The district court relied on three cases to support its suppression order. *United States* v. *Sourapas*, 515 F.2d 295 (9th Cir. 1975); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969). In each the court of appeals ordered suppression of evidence obtained as a result of an IRS investigation of putative criminal defendants conducted without the provision of *Miranda*-type warnings as required by IRS regulations.

The government attempts to escape our holding in *Sourapas* by distinguishing it as a case dealing with principles emanating from the Fifth Amendment, whereas this case concerns Fourth Amendment problems. But the *Sourapas* court framed its issue in broad terms: "[W]hether [the IRS agent] failed to substantially comply with the publicized IRS procedures and if so, whether the evidence suppressed was wrongfully obtained. . . ." 515 F.2d at 298.[3]

[3] Similarly, the *Leahey* court framed the "crucial question" as being

"whether we must exclude this evidence so that agencies

By holding in *Sourapas* that evidence obtained by IRS activity which did not substantially comply with its own regulations must be suppressed, we placed no special emphasis upon the specific constitutional principles which underlay the regulatory scheme at issue. We regard *Sourapas* as controlling here.

During "a period of increasing disenchantment with the exclusionary rule," *United States* v. *Leonard*, 524 F.2d 1076, 1089 (2nd Cir. 1975),[4] the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach.[5] Nevertheless, *Sourapas* remains the law of this circuit. Absent a contrary ruling by the Supreme Court or by this court en banc, we are bound to follow it.

Our decision today does not mean that in every instance a deviation from general guidelines govern-

---

will be compelled to adhere to the standards of behavior that they have formally and purposely adopted in the light of the requirements of the Constitution, even though these standards may go somewhat further than the Constitution requires."

434 F.2d at 10.

[4] *See, e.g., United States* v. *Janis*, —— U.S. ——, 44 USLW 5303 (July 6, 1976); *Stone* v. *Powell*, —— U.S. ——, 44 US LW 5313 (July 6, 1976); *Leonard, supra*, 524 F.2d at 1089 and Supreme Court cases cited; *United States* v. *Walden*, 490 F.2d 372 (4th Cir. 1974).

[5] *But see* the analysis of Chief Judge Coffin in *Leahey, supra*, 434 F.2d at 10-11, in support of application of the exclusionary rule in the event of noncompliance with administrative procedure.

ing Executive exercises of discretion will result in automatic exclusion of evidence. As noted in *United States* v. *Leahey*, 434 F.2d 7, 11 (1st Cir. 1970): "We do not say that agencies always violate due process when they fail to adhere to their procedures." Here, however, the noncompliance by the IRS for the January 31 and February 6 monitorings harmed more than just the "efficiency of the I.R.S. operations." *Id.*

B. *Poisonous Fruit*

Appellee asserts that the IRS agent's application for authorization for the February 11, 1975 monitoring contained information illegally obtained during the monitorings on January 31 and February 6. He argues that all evidence obtained from the February 11 meeting must therefore be suppressed as "fruit of the poisonous tree."

Yet it is clear that the information in the application for authorization was based upon the agent's independent recollection of the meetings of January 31 and February 6, not upon the recordings themselves. Since the agent's presence at the meeting with appellee was scarcely illegal, the agent's own recollection constituted a valid source independent of the "poisonous" tapes.

It was the conversations themselves, not the illegal monitoring thereof, which led to the application for the February 11 monitoring. Since the illegal monitoring itself did not "tend significantly to direct the investigation toward the specific evidence sought to

be suppressed . . .," *United States* v. *Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974), suppression of evidence obtained on February 11, 1975 was not warranted.

III.

CONCLUSION

The district court's order suppressing evidence obtained from the illegal monitoring of January 31 and February 6, 1975 is affirmed. The order suppressing evidence obtained from the monitoring of February 11, 1975 is reversed. Remanded for proceedings consistent herewith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1091

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ALFREDO L. CACERES, DEFENDANT-APPELLEE

Before: WRIGHT and SNEED, Circuit Judges, and FITZGERALD, District Judge.

[January 20, 1977]

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Sneed have voted to reject the en banc suggestion.

The full court has been advised of the suggestion for a rehearing en banc, and no judge of the court has requested a vote on the en banc suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The panel has voted to amend the slip opinion filed October 15, 1976. The following additional paragraph will be inserted on page 7 of the slip opinion, following the second full paragraph:

> Our decision today does not mean that in every instance a deviation from general guidelines governing Executive exercises of discretion will result in the automatic exclusion of evidence. As noted in *United States* v. *Leahey*, 434 F.2d 7, 11 (1st Cir. 1970): "We do not say that agencies always violate due process when they fail to adhere to their procedures." Here, however, the noncompliance by the IRS for the January 31 and February 6 monitorings harmed more than just the "efficiency of the I.R.S. operations." *Id.*

The opinion filed October 15, 1976 is ordered withdrawn and reprinted to incorporate the above language. The clerk is also directed to correct the designation of Caceres as the appellant. He should be referred to as the appellee and the government as the appellant.

DATED:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 75-129 GBH

[Original Filed Dec. 10, 1975, William L. Whittaker, Clerk, U. S. Dist. Court, San Francisco]

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALFREDO L. CACERES, DEFENDANT

OPINION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant Caceres has been indicted for bribery of a public official. He comes before the court seeking to suppress evidence obtained by means of alleged illegal electronic monitoring and surveillance.

The investigation by the Internal Revenue Service relevant to this proceeding began when Agent Yee reported an alleged bribe offer made to him by defendant. The Internal Security Division of the I.R.S., under the general case supervision of Inspector Hill, began its investigation in March of 1974. On March 21, 1974, Agent Yee's telephone call to defendant was electronically monitored.

Agent Yee had a follow-up telephone conversation with defendant that month (not monitored), but thereafter, although the investigation continued, Agent Yee's contacts were confined to defendant's wife and defendant's accountant until January of 1975.

Agent Yee resumed his contact with defendant by initiating telephone calls on January 28, 1975, and subsequent telephone calls on January 29, January 30, February 5 and February 13, 1975. All of these telephone conversations were electronically monitored.

Agent Yee also had in-person meetings with defendant on January 21, February 6 and February 11, 1975. These, too, were electronically recorded by means of a device planted on Agent Yee's person.

Defendant attacks the evidence gathered from such electronic monitoring on a variety of grounds. For purposes of the instant motion, the telephone and in-person contacts will be considered separately.

I. *Electronic Surveillance of Telephone Conversations*

The I.R.S. has promulgated a comprehensive set of regulations governing both telephone and in-person conversation monitoring.

Internal Revenue Manual Para. 652.21, which governs telephone monitoring under the circumstances at issue here, permits such monitoring only if consensual [see also Para. 652.3] and only after approval is sought and received from the Assistant Regional Inspector (Internal Security) or the Chief of the National Office Investigations Branch (Internal

Security), or in the absence of any of them, the person acting in his or her place. The regulation also requires that, as soon as practicable after the interception, the case inspector file a report with the approving higher official containing certain designated information.

Each of the recorded telephone conversations was conducted pursuant to oral authority granted by the Assistant Regional Inspector and appears to be at least in substantial compliance with the governing I.R.S. regulations and therefore proper.

Defendant's remaining basis for attack is that such monitoring was in violation of state law, to-wit, California Penal Code § 632. Although defendant contends that the I.R.S. regulations intend to prohibit electronic monitoring whether unlawful under federal *or* state law, a fair reading of the regulations will not support this interpretation, and the Ninth Circuit has explicitly rejected this line of reasoning. *United States* v. *Keen*, 508 F.2d 986, 989 (9th Cir. 1974), *cert. den.*, —— U.S. —— (1975). *See also United States* v. *Shaffer*, 520 F.2d 1369, 1371-1372 (3rd Cir. 1975).

Accordingly, defendant's motion to suppress as to evidence obtained from the monitored telephone conversations is hereby DENIED.

II. *Electronic Surveillance of In-Person Conversations*

Recognizing the increased sensitivity and need for protection with respect to in-person conversations, the Internal Revenue Manual prescribes a more stringent

procedure when authority is sought to monitor these. Para. 652.22 governs consensual monitoring of non-telephone conversations and requires the advance approval of all of the following: the Regional Inspector (or Chief, Investigations Branch); the Director, Internal Security Division; and the Attorney General or any designated Assistant Attorney General. By regulation, the authority of the Attorney General or any designated Assistant Attorney General cannot be redelegated.

The Government contends that the I.R.S. was in literal, or at least substantial, compliance with these regulations when it carried out the in-person monitoring of defendant, but this contention is not supported by the record or the applicable law. At no time was there granted authorization from the Attorney General or any designated Assistant Attorney General for the monitoring in question here. The in-person conversation of February 11, 1975, was authorized by a *Deputy* Assistant Attorney General, but this is not a person authorized by the regulation to give such approval, and the regulation clearly provides that there may be no redelegation of such authority.

The Government concedes that at least as to the in-person conversations of January 31 and February 6, 1975, there was no prior authorization by the Attorney General or any designated Assistant Attorney General. The Government argues, however, that such authorization was unnecessary as to *any* of the in-person conversations because the I.R.S. was proceed-

ing under the less stringent "emergency" provisions of Para. 652.22.

Subsection (1) thereof provides that prior approval of the Attorney General (or any designated Assistant Attorney General) need not be sought in certain situations. The Director, Internal Security Division "may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance." Although no definition of "exigent circumstances" is provided by the regulations, both parties herein have proceeded on the basis that an emergency situation does not exist under the regulation when the requested official has more than 48 hours to obtain written advance approval from the Attorney General or a designated Assistant Attorney General. See Para. 653.22 (6).

It is clear that there was here no "emergency" within the intendment of the regulation. Each of the in-person conversations occurred as the result of action initiated by Agent Yee after Yee and Inspector Hill had devised a general method for dealing with defendant. In each instance Agent Yee picked the day on which the meeting between defendant and him was to be conducted. No emergency apart from this existed. Agent Yee first testified that he was concerned about the running of the applicable statute of limitations against defendant on his tax investigation, but subsequent testimony confirmed that (a) such statute would not lapse on the normal date of January 31, 1975, but was in fact extended to late

February or early March because of defendant's previous late filing, a fact known to Agent Yee, and (b) that Agent Yee offered no satisfactory explanation why defendant was not contacted in the 10-month hiatus following the monitored telephone call of March 1974. In short, the only "emergency" was created wholly by the I.R.S.

Inspector Hill testified that he had sought written authorization in late January from the Attorney General for surveillance over a thirty-day period, but that since it had not yet been received there existed an "emergency" which allowed the monitoring of the January 31 and February 6 conversations without such approval. This argument is without logic or merit, and does not excuse the non-compliance with explicit I.R.S. regulations.

The Government argues that even if the I.R.S. regulations were not followed, that nonetheless such failure should not be the basis for suppressing evidence in this criminal proceeding.

This court believes, however, that the instant case is controlled by Ninth Circuit law as expresed in *United States* v. *Sourapis* [sic], 515 F.2d 295, 298 (9th Cir. 1975). The court reads this case as approving the holdings of *United States* v. *Heffner*, 420 F. 2d 809, 811 (4th Cir. 1969) and *United States* v. *Leahey*, 434 F. 2d 7, 10 (1st Cir. 1970) in situations such as that presented here. Those cases cannot be distinguished, contrary to the Government's contention, by the fact of greater publicity accorded to the I.R.S. pronouncements at issue therein, for

the I.R.S. regulations challenged here were likewise available for public inspection, and the same reasons which underlie decisions such as *Sourapis* [sic] apply equally here.

Accordingly, as to the in-person conversations of January 31, February 6 and February 11, 1975, defendant's motion to suppress is hereby GRANTED.

It is so ordered.

Dated: Dec. 16, 1975

/s/ Geo. B. Harris,
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 230820 72

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1978

No. 76-1309

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

ALFREDO L. CACERES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 21, 1977
CERTIORARI GRANTED JUNE 5, 1978

Supreme Court of the United States

OCTOBER TERM, 1978

No. 76-1309

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

ALFREDO L. CACERES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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* A copy of the opinion of the United States Court of Appeals for the Ninth Circuit was reproduced as Appendix A to the petition for a writ of certiorari (pp. 1a-12a). The order of the court of appeals modifying the opinion was reproduced as Appendix B to the petition (p. 13a-14a), and the order of the United States District Court for the Northern District of California, granting defendant's motion to suppress, was reproduced as Appendix C to the petition (p. 15a-21a).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CR 75 129 RHS

UNITED STATES

v.

ALFREDO L. CACERES

Date	Proceedings
2/26/75	1. Filed Indictment
3/7/75	— ORD: Deft pres, entered a pl of Not Guilty, all mos to be heard no later than 3/28/75 & cont'd for setting 3/28/75. RHS
8/11/75	— ORD: jr. tr.; jury impanelled; witnesses sworn, evid. introd.; RHS
8/22/75	— ORD.: jury hangs, discharged; all exhibits withdrawn; court disqualified itself RHS
8/27/75	11. Filed order of reassignment to Hon. GEORGE HARRIS. OJC
11/24/75	33. Defendant's notice of motion to suppress evidence obtained by illegal searches and seizures; motion to suppress; memo in support of motion to suppress; and proposed order (12/3/75 10 am)
12/3/75	43. Defendant's supplemental memo in support of defendant's motion to suppress
12/5/75	45. Government's response to defendant's motion to suppress evidence.
12/8/75	46. Defendant's reply memo to the government's motion to suppress evidence.

Date	Proceedings
12/8/75	49. MINUTE ORDER for 12/8/75: on defendant's motions to suppress for discovery and inspection and to strike portions of the Goldenberg affidavit. Statements, evidence, testimony, further hearing set for 12/10/75 10 am
12/10/75	50. MINUTE ORDER FOR 12/10/75: further hearing of defendant's motions to suppress for discovery and inspection and to strike portions of Goldenberg affidavit-submitted GBH
12/16/75	53. Opinion and ORDER granting defendant's motion to suppress—GBH
1/7/76	55. MINUTE ORDER: Motions & trial date vacated; further motion to be made at a time to be set later—GBH
1/9/76	56. NOTICE OF APPEAL by plaintiff (from Order suppressing evidence, dated 12-16-75)
1/13/76	57. Appellant's designation of record on appeal
1/13/76	58. Appellant's request for preparation of appeal transcripts
1/16/76	60. Stipulation & ORDER vacating 1-7-76 hearing date & 1-19-76 trial date pending an appeal by the Govt. —GBH
1/29/76	62. Reporter's Transcript of Dec. 8 & 10, 1975 (orig. & 2 copies)
2/6/76	— Made and Mailed Record on appeal

JAMES L. BROWNING, JR.
United States Attorney
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. CR75 129RHS

[Filed Feb. 26, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALFREDO L. CACERES, DEFENDANT

VIOLATION: Title 18 U.S.C. Section 201(b)—Bribery of a Public Official

INDICTMENT

COUNT ONE: [T. 18 U.S.C. § 201(b)]

The Grand Jury charges: THAT

On or about January 31, 1975, in the City and County of San Francisco, State and Northern District of California,

ALFREDO L. CACERES

corruptly gave $500.00 to a public official with the intent to induce said official to do acts in violation of his lawful duty, relating to defendant's federal income tax for the year 1971 and employment taxes for the years 1971 and 1972.

COUNT TWO: [T. 18 U.S.C. § 201(b)]

The Grand Jury further charges: THAT

On or about February 6, 1975, in the City and County of San Francisco, State and Northern District of California,

ALFREDO L. CACERES

corruptly offered $2,000.00 to a public official with the intent to induce said official to do acts in violation of his lawful duty, relating to defendant's federal income taxes for the years 1973 and 1974.

COUNT THREE: [T. 18 U.S.C. § 201(b)]

The Grand Jury further charges: THAT

On or about February 11, 1975, in the City and County of San Francisco, State and Northern District of California,

ALFREDO L. CACERES

corruptly gave $500.00 to a public official with the intent to induce said official to do acts in violation of his lawful duty, relating to defendant's federal income tax for the year 1971 and employment taxes for the years 1971 and 1972.

A True Bill.

JAMES L. BROWNING, JR.
United States Attorney

(Approved as to Form ——)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR 75-129 GBH

BEFORE: THE HONORABLE GEORGE B. HARRIS, JUDGE

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ALFREDO L. CACERES, DEFENDANT

REPORTER'S TRANSCRIPT:

MONDAY, DECEMBER 8, 1975

WEDNESDAY, DECEMBER 10, 1975

TRANSCRIPT ON APPEAL

INDEX

[3] PROCEEDINGS

MONDAY, DECEMBER 8, 1975:

THE CLERK: Criminal 75-129, United States versus Alfredo L. Caceres; defendant's motion to suppress, motion for discovery and inspection, and motion to strike portions of Goldenberg's affidavit.

MR. WARD: Robert Ward appearing for the Government, Your Honor. Good afternoon.

MR. BROSNAHAN: Good afternoon, Your Honor. James Brosnahan appearing for the defendant, Dr. Caceres.

THE COURT: Will you proceed, please?

MR. BROSNAHAN: Your Honor, I would like to make a brief statement. We filed several memorandums to Your Honor. We have prepared a copy of some charts that we have here which I think will be helpful for the Court on the question of what is the proper authorization that should be obtained.

To start with, if the Court please, we are concerned with two types of electronic surveillance undertaken by the Internal Security Division of the Internal Revenue Service.

The first type is telephone electronic eavesdropping accomplished allegedly and presumably with the consent of Agent Yee when he was talking on the phone with Dr. Caceres. There were a number of those. The first one started March 21 [4] of 1974, and there were a number of telephone conversations.

There were also three in-person conversations which were monitored by an electronic device on the person of Agent Yee without the knowledge of Dr. Caceres. The first of those occurred on January 31st, 1975, at 2:04 in the afternoon.

So we have seven telephone conversations and three in-person conversations.

As Your Honor knows from the memoranda which we have filed in the last ten or so years out of all the controversy about electronic surveillance, the Internal Revenue Service, to its great credit, adopted specific

regulations, determining how authority could be obtained, what persons within the Government would be required to give authority. Those regulations were prepared and they have been published. We found them in the CCH Tax Advisor, and the Internal Revenue has put those out for the world to see.

These are two types of procedures, one for telephone and one for in-person. It is obvious from an examination of these procedures that the telephone authority was not considered to be quite as sensitive or serious as the in-person conversations.

The non-telephone monitoring, where there is no emergency, calls for approval by the Attorney General of the United States or an Assistant Attorney General specially [5] designated by him, so that these Internal Revenue Service Regulations in that regard, at least, are similar to the wiretap regulations and the statutory provisions. And I imagine Your Honor has had some of those cases.

The first point that the defense makes is that the Internal Revenue Service, out of all the people they could have chosen in the Government who they thought would be the appropriate person to approve or not approve in-person telephonic monitoring, they determined that it should be done by the Attorney General or Assistant Attorney General designated by him.

We point out in the beginning that attorney generals and assistant attorney generals are approved by the Senate, an item which is of tremendous importance in the wiretap field. There is no mention of a deputy attorney general.

In the case of in-person telephone monitoring, the authorization is to be obtained starting with the inspector who was in the field. He is to go to the regional inspector, who is a person here in this region, in this city, who, in turn, must go to the Director of Internal Security Division, who is in Washington, who must sign this request and then it must go to the Attorney General. Then, the memorandum of approval must come back down through channels to the inspector.

That was authorized, as far as the Internal Revenue [6] Service was concerned, as a matter of policy long

before the Caceres case. They didn't want any inspector, any regional inspector or anybody else deciding that they ought to have this electronic surveillance.

Then, as an additional safeguard, there is to be a report back to the Director of Internal Security Division explaining what has happened and setting out certain information, all of which is described in these regulations.

Now that is the first thing that we start with so far as the in-person conversations are concerned. We will establish, as a matter of fact, that not one of the in-person monitorings was ever authorized by either an attorney general or an assistant attorney general in this case. If that was done, that will be news to us. We have now seen what purports to be all of the authorizing memoranda. We have seen the affidavit of Mr. Goldenberg, we have read carefully the legal memoranda of the Government. We don't see a word in there about assistant attorney general or an attorney general.

There was evidently, as to one of the in-person conversations, a purported authorization by a deputy assistant attorney general.

As Your Honor well knows, that is a person who is under the assistant attorney general in the Department of Justice. That is not the deputy attorney general who serves under the attorney general. It is a deputy assistant attorney [7] general who serves under an assistant attorney general in one of the divisions of the department.

So we start, and we think the evidence will show this, from the proposition that the proper authorities never authorized this.

From the Government's memoranda, it is clear that they will argue that there was an emergency that somehow justified the emergency provisions under Paragraph 652 subpart 22. Those emergencies are described as being when less than 48 hours is available.

In those cases, the inspector may put in to the Director of Internal Security Division for authorization, and the Director of Internal Security Division or one

other official that was named may make an authorization.

We argue that that authorization must be in written form and must be obtained before the monitoring goes on. We argue that it is precisely the discretion of a national person, not caught up in the emotion of a local investigation, who is supposed to have this independent judgment, which is placed there for the protection of persons against whom these monitoring devices will be used.

In the case where emergency situations are found to actually exist in the discretion of the Director of Internal Security Division, he may authorize it, all right, but then information is to come back to him and he is to make [8] a report to the attorney general as to what has gone on and there is to be an explanation as to why it was that the emergency provisions had to be used.

The whole purpose of it, very clearly, is to insist that these regulations, once adopted by the Internal Revenue Service, be followed by all of the inspectors and others.

We will show, as a matter of fact, in the evidence, here, that there was no real emergency. The only created emergency was when Agent Yee was talking to Dr. Caceres on the question of when they would meet. And it was Agent Yee who suggested to Dr. Caceres in each case that they meet "tomorrow."

Thus, the emergency was created by the inspector and not by any outside third party, and certainly not by Dr. Caceres. It was done not once but three times.

The transcripts show that, Your Honor, and we have argued that to Your Honor in the supplemental memorandum which was filed this morning.

The third system has to do with telephone surveillance. In that case, the inspector in the field is to get the approval by the assistant regional inspector, and that is to be done in writing except—and I will get to the except in just a moment—it was not really done in writing, it was done on the phone at all times.

The regulations provide that there may be oral [9] approval if the assistant regional inspector believes that

it is appropriate, but there must be a follow-up immediately to say why this was required.

We will be examining into these documents to see whether they really have properly complied with these regulations as we go along in the hearing.

We are prepared to call our first witness, Your Honor, if that is appropriate.

THE COURT: Do you desire to make a statement?

MR. WARD: I might say, Your Honor, that it is the Government's view that if evidence is adduced, the evidence will show that the agents were in compliance with the regulations in this matter. If not in literal compliance, certainly they were in substantial compliance.

Does the Court wish to, perhaps in advance of hearing evidence, listen to arguments pertaining to the issue of even if the defendant is successful in showing that the regulations or the instructions were not complied with, it is the Government's very strong view that, nevertheless, that is not just cause for the evidence in this case being suppressed. If the Court wishes to hear arguments on that aspect, perhaps prior to bringing on evidence, there might not be any need for evidence.

THE COURT: I think I will hear the matter with continuity.

[10] Go right ahead.

MR. WARD: Very well.

MR. BROSNAHAN: Thank you.

We will call Agent Yee, Your Honor.

AGENT ROBERT K. YEE,

a witness called on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please take the stand.

Please state your name and occupation.

THE WITNESS: Robert K. Yee, Internal Revenue Agent.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. BROSNAHAN:

Q. What is your occupation, sir?
A. Internal Revenue Agent.
Q. How long have you been so employed?
A. I have been employed since '72.
Q. During an investigation in 1974, did you have occasion to record a telephone conversation that you had with Dr. Caceres?
A. I didn't do any recording.
Q. Were you present when your telephone conversation [11] with Dr. Caceres was recorded in 1974?
A. On which date?
THE COURT: What was that?
THE WITNESS: I don't know which date he is talking about.
MR. BROSNAHAN: Q. Let me ask you this, Mr. Yee: In 1974, not 1975, but 1974, was there more than one telephone conversation recorded in which you talked to Dr. Caceres?
A. I remember one. There may have been two; I don't know.
Q. You recall one and there may have been two. I take it you are less sure about the second one; is that right?
A. I am not familiar with the dates, sir. I don't really recall the dates right now.
Q. Well, do you recall when the investigation began concerning the allegation that Dr. Caceres had made an offer to you of a personal settlement? Do you recall that?
A. Yes, I do.
Q. Around that time, was there one personal telephone conversation recorded or more than one?
A. I really don't remember.
Q. Now the transcripts which have been produced and used at the first trial, you will accept my word for this, a telephone conversation of March 21, 1974, at 11:33 a.m.— [12] do you recall that conversation?
A. I remember making a call. I really do not remember the total substance of the call.

Q. Do you recall where you were when you made the call?
A. Yes, I was at the Inspection Office.
Q. Where is that located?
A. On Pine Street.
Q. Who else was with you?
A. Inspector Hill and there was a technician operating there, a tape recorder.
Q. Was the telephone conversation recorded?
A. Yes.
Q. How was it recorded?
A. They had a tape recorder with a device on the handle.
Q. Do you know whether any approval had been obtained for monitoring that telephone conversation before it was done?
A. I don't know of any.
Q. You didn't obtain any from anybody?
A. No.
Q. Do you know anybody that did obtain any approval to monitor your telephone conversation?
A. I don't know what Inspection was doing as far as that was concerned. I wasn't concerned with that.
Q. There are other telephone conversations which we [13] have the transcripts of in 1975, including January 28, 1975, January 28, 1975, second call, January 29, 1975, January 30, 1975. Let's take those four conversations.
Where did you make those telephone calls from?
A. They were at the Inspection Office.
Q. In each case where the conversation was recorded, did you initiate the call?
A. Yes, sir.
Q. In each case before you called, did you discuss with anyone what you were going to say once you got on the line?
A. Yes, generally.
Q. Do you know whether or not approval was obtained or authorization was obtained for those telephone conversations?
A. I don't know.

Q. Directing your attention to the first in-person conversation, January 31, 1975, at 2:04 p.m., do you recall the first time that an in-person conversation with Dr. Caceres was monitored?

A. There was—with the doctor, no. That would have been, probably have been the first one.

Q. Do you know how many times you had a monitoring device on your person when you talked to Dr. Caceres?

A. At that time and the next two meetings, I think.

Q. Are you sure that it was only three times?

[14] A. That is all I can recall right now.

Q. Now with regard to the first one on January 31, 1975, do you know whether there was any authorization for that monitoring?

A. I don't know.

Q. You didn't obtain any, at any rate.

A. No.

Q. Who was in charge of the investigation?

A. I don't know. It was either Inspector Hill or Inspector Goldenberg; I don't know.

Q. Who was with you when this first in-person device was put on your person? Was that Agent Hill?

A. Yes.

Q. Was he present the other times when you geared up to go to talk to Dr. Caceres in person?

A. I believe so.

Q. Was Agent Hill present during all of the telephone conversations as well?

A. I believe so.

Q. In the interest of time, Mr. Yee, we have taken portions of the transcript from your different calls and put it into our reply memorandum today. I don't know if you have seen this, but the first one, having to do with setting up this meeting, January 31, 1975, reads, and I quote—it is not very long:

[15] "CACERES: Hello.

"YEE: Dr. Caceres?

"CACERES: Yes; how are you?

"YEE: Not bad. Yourself?

"CACERES: Fine, thank you. You just caught me in.

"YEE: Yeah, I've been trying to get ahold of you this afternoon.

"CACERES: I'm a little bit out of breath.

"YEE: Oh, well; ah say, I've been considering the case and ah what we've been talking about this week and ah maybe I could be a, have a little bit more latitude on, on the time factor but uhm I want to meet with you ah tomorrow and discuss ah these things.

"CACERES: All right. Well, I'll arrange my schedule to your convenience."

Do you recall making those statements to Dr. Caceres?

A. Yes.

Q. It was you who suggested meeting tomorrow?

A. That is right.

Q. Did you discuss that with Agent Hill before you made the call?

A. Yes.

Q. And he approved of that procedure, I take it?

A. Well, a date was decided because it was the last [16] day of the statute period as far as the normal filing of employer tax returns, so I had stalled all along this week and it just came down to a matter of getting one meeting in where I could either find out yes or no as to the disposition of the case.

Q. The last day of the statute was in June, wasn't it?

A. No.

Q. What day do you say, Agent Yee, the last day of the statute was, January 31, 1975?

A. For a 940 Federal Unemployment Tax Return, a normal statute runs on January 31.

Q. And which statute are you referring to, sir?

A. The 1971 940 return.

Q. Were you auditing the 1971 return?

A. Yes sir.

Q. And the statute ran on that day, did it?

A. No, it was filed late so it would have run whenever the date he did file, but the time period exactly of filing was very short.

A. At that time and the next two meeting, I think.

Q. Let's just look at your knowledge of it.

You knew that the statute ran from the day that the return was filed, didn't you?

A. Yes sir.

Q. And the return wasn't filed on January 31, 1975, was it?

[17] A. No.

Q. 1971; I am sorry.

A. No.

Q. When was it filed?

A. It was filed in February some time.

Q. So the statute didn't run that day, did it?

A. No, it didn't.

Q. And you knew that it didn't run on that day: isn't that true?

A. Yes, I knew that.

Q. Agent Yee, I'd like to briefly read from the transcript in which the second in-person meeting was set up February 6, 1975.

Reading from Page 3 of our memo:

"CACERES: Hello.

"YEE: Doctor?

"CACHERES: Yes; how are you?

"YEE: Hi; not bad.

"CACERES: Good.

"YEE: I have got the agreement form drawn up and I thought you might like to see it.

"CACERES: All right. Um, what to—what time?

"YEE: Ah, well, ah I was thinking about tomorrow afternoon.

"CACERES: Are you at the office now?

[18] "YEE: Ah, no, I'm outside.

"If we say 3:00 o'clock, then would that be okay?"

Do you recall making those statements to Dr. Caceres?

A. Yes.

Q. Again, you asked for a meeting the following day.

A. Yes.

Q. Was that approved by Agent Hill before you made the call?

A. Yes.

Q. So that we might understand the procedure, each time before you made a call to Dr. Caceres, you talked to Agent Hill about what you were going to say?

A. Not the exact conversation, no. What is generally discussed prior to a phone call is what I am about to say, what I say myself, and he approves as to what I have to say.

Q. The two of you then, so I may understand it, would talk together and hit upon a general plan as to what you were going to say in general on the phone; is that true?

A. Yeah.

Q. Now the conversation for the third in-person conversation, February 11, 1975, is as follows on Page 4 of our memorandum:

"YEE: The returns are still old so I got to move kind of quickly on them. Old in as far as the Internal [19] Revenue is concerned. You know . . . Remember the statute? The statutes—

"CACERES: Yeah, yeah, yeah. I will get that thing for you Tuesday. If you need it before, I'll get it tomorrow.

"YEE: Let's make it Tuesday."

Do you recall saying that to Dr. Caceres?

A. Yes.

Q. Did you check that with Agent Hill before you said it?

A. In a way, yes.

Q. Now have you ever seen any authorization forms or memoranda dealing with obtaining authorization for any of these telephone or in-person conversations?

A. Nope.

Q. You are a Revenue Agent?

A. That is right.

MR. BROSNAHAN: May I have just a moment, Your Honor? I think that is all I have of this witness.

THE COURT: Surely.

MR. BROSNAHAN: That is all we have of this witness, Your Honor.

Thank you.

THE COURT: Mr. Ward?

[20] CROSS-EXAMINATION

BY MR. WARD:

Q. Mr. Yee, prior to your meeting of January 31, had you met with Dr. Caceres on January 27?

A. Yes.

Q. In that meeting with Dr. Caceres, had you given him any indication about the length of time, how much further you would go in discussing with him the audit on a particular return?

A. Yes.

Q. Can you just tell us the substance of what you said to him?

A. Well, it came down to the fact that he wanted additional time to go over certain records. And I told him that the time period in which to act was very short and I could not wait another week, I had to know.

Q. And was, in fact, the time period short in your mind?

A. Yes, it was.

Q. What was your belief at that time as to when the statute ran, the particular statute that you discussed on direct examination?

A. Well, I had, I knew that it would run in March or February, late February or March sometime.

Q. Did you, then, account for administrative time in turning in your reports as agreed upon?

[21] A. Oh, yes. There would have been a time period to write up the case and then there would have been a time period for submission to my supervisor and also on to the review branch and the various other administrative things that go on before a case is processed.

Q. At any time prior to the January 31 meeting, did you make any estimate to Dr. Caceres or any of his representatives that you would not let the matter go into February?

A. I might have said that.

Q. Was that a time fixed by yourself or by—I am talking about these preliminary conversations—was that a time that you were concerned about or was it something that Agent Hill or any other inspector had advised you of?

A. I was concerned about the date. I wanted to have enough time to work the case and get it into process.

Q. Did Agent Hill or any other representative of Inspection ever say to you that they wanted a meeting with the doctor at a certain date so that they could secure emergency authorization or bypass any of the rules of authorization?

A. They never mentioned anything about authorization to me.

Q. Did you have any knowledge or familarity with the authorization procedures or instructions of Agent Hill and [22] the other Inspection agents?

A. I have heard them talking about it at times, but it didn't mean anything to me.

Q. Now with respect to the meeting that took place on February 6, can you tell us how that meeting happened to take place on that date?

A. Well, on the 31st, at the conclusion of the meeting, it was generally decided upon that I would go back to my office and work up the figures, based on what we had discussed during that meeting, and that I said I would either send it over to him or we could meet somewhere. And then he said, "Why don't we meet," and so I called him on the 5th, the day before the meeting, to tell him that I had my figures drawn up.

Q. When you called him on the 5th, did you have any particular instruction from Agent Hill or any other agent as to when to set the meeting?

A. Well, I think generally they told me when to have it so that they could have enough people to cover the meeting.

Q. Did you ever state any reason other than that for the time they suggested?

A. No.

MR. WARD: No further questions.

MR. BROSNAHAN: Just a question or two, Your Honor.

[23] REDIRECT EXAMINATION

BY MR. BROSNAHAN:

Q. Agent Yee, the testimony is that the first conversation which was monitored was in March of 1974. I take it there is no question but that that is true, that the first conversation monitored by telephone with electronic devices occurred in March of 1974; is that right?

A. Yes.

Q. At that time, it is your testimony, isn't it, that Dr. Caceres had offered to make a personal settlement to you? Isn't that your version of what had occurred before March 21, 1974?

A. That is right.

Q. And, of course, in March of 1974, the statute of limitations that you have been talking about had a full year to run, didn't it?

A. Yeah, just about.

Q. And in March of 1974, you were already in contact with Agent Hill, who is here in the courtroom, weren't you?

A. Yes.

Q. And you had advised him of your version of what had occurred in the conversation with Dr. Caceres whereby you claimed that Dr. Caceres had offered you a personal settlement; isn't that right?

A. That is right.

Q. But there were no monitored conversations between [24] March of 1974 and January 28 of 1975; isn't that also true?

A. That is about right.

Q. So in that period of approximately ten and a half months, the Internal Revenue Service, so far as your information is concerned, did not have any monitored conversations with Dr. Caceres.

A. That is right. I didn't deal with him.

Q. You didn't deal with him during that period?

A. No.

Q. You never called him during that period?

A. No. The week after—okay. That week, I had

phoned him up and gave him a list of things to bring for our meeting and we had set up a March 28 date.

Q. But in April, May, June, July, August, September and so forth, throughout 1974, you never called Dr. Caceres, did you?

A. No.

Q. Agent Hill never asked you to call him, did he?

A. No.

Q. And during that time period, you were fully aware that the statute of limitations was running, weren't you?

A. Well, yeah.

Q. That is part of your regular work, you know that the statute always runs and you knew that the statute was running during the year 1974; isn't that right?

[25] A. Normally, you don't get too concerned with it a year in advance.

Q. How about six months in advance, you get concerned then, don't you?

A. Slightly.

Q. Yes.

Thank you. That is all I have.

THE COURT: Let's take about a five-minute recess.

(Brief recess.)

RECROSS-EXAMINATION

BY MR. WARD:

Q. Mr. Yee, during the period of time that Mr. Brosnahan most recently referred to, that is, from approximately April of '74 through January of '75, did you have any dealings with anyone else besides Dr. Caceres in pursuing your audit?

A. Oh, I was dealing with his accountant at that time.

Q. And were you dealing with anyone else in addition to the accountant?

A. His wife was available sometimes also.

Q. Did his wife do some of the bookkeeping for Dr. Caceres?

A. Apparently, she was handling the records.

Q. And at any time during that period of time did you attempt to call Dr. Caceres?

A. Nope.

[26] Q. Did you attempt to contact him at any time during that period of time?

A. No, I felt the accountant was doing the best he could do.

Q. Thank you.

No further questions.

MR. BROSNAHAN: I have no further questions, Your Honor.

Thank you.

THE COURT: You may step down.

(Witness excused.)

MR. BROSNAHAN: Call Agent Hill.

AGENT WILLIAM HILL,

a witness called on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please state you name and occupation.

THE WITNESS: William Hill, Criminal Investigator.

DIRECT EXAMINATION

BY MR. BROSNAHAN:

Q. For whom are you a criminal investigator, Mr. Hill?

A. The Internal Revenue Service, Inspector Division.

Q. How long have you been so employed?

[27] A. Five years.

Q. Did you work on the Caceres investigation?

A. Yes, I did.

Q. Were you in charge of this investigation?

A. I was the case inspector, yes sir.

Q. In the terminology of your office, if you are the case inspector, does that mean you are in charge of it?

A. Yes.

Q. Who assisted you in that investigation, what agents, by name and rank, please.

A. Inspector Marvin Stevens was a mechanical assistant. Inspector Ted Goldenberg, my supervisor, was involved.

Ed Westbrook was a supervisor through part of it.

There were several other technical assistants. Do you want their names also?

Q. If you can remember them, yes.

A. Inspector Dave Jorgenson, who was a technician.

Inspector Wayne Pagent, who was a technician.

I believe that would be it that were directly involved. There were several others that were involved in surveillances, in person, in meetings between Agent Yee and Dr. Caceres.

Q. Directing you attention to March of 1974, had there come a time when Agent Yee had reported to the office concerning Dr. Caceres?

[28] A. Yes.

Q. When did he do that, do you recall?

A. I believe that date was March 14, 1974.

Q. Did he talk with you on March 14?

A. Yes, he did.

Q. He gave you his version of what had occurred on Dr. Caceres?

A. Yes.

Q. Gave you an affidavit?

A. Yes, he did.

Q. You knew that, based on the information you had, it was possible that an effort had been made to bribe an Internal Revenue Service Agent, according to Agent Yee's testimony?

A. That is correct.

Q. You opened a file on the matter?

A. Yes.

Q. Did you plan at that point electronic surveillance of Dr. Caceres?

A. Electronic monitoring, not necessarily surveillance.

Q. Let's take monitoring.

What do you mean when you say, "monitoring"?

A. Recording of telephone conversations or possibly in-person meetings.

Q. Surveillance would be from a car across the street, [29] or what do you mean when you say, "surveillance"?

A. It could be the use of eavesdropping equipment from a distance other than telephonic use, or any other means using electronic equipment.

Q. But on the 14th of March, 1974, did you plan electronic monitoring of Dr. Caceres?

A. That is correct.

Q. Included in your plans were electronic monitoring of the telephone?

A. I believe so, yes sir.

Q. And in person?

A. Yes sir.

Q. Now you are an agent in the Internal Security Division of the Internal Revenue Service.

A. Yes. My title is Inspector rather than Agent.

Q. Inspector; thank you.

And that is a division that has duties concerning the integrity of the Internal Revenue Service.

A. Yes.

Q. It is not the Intelligence Division, is it?

A. No, it is not.

Q. It is separate from the Intelligence Division.

A. Yes.

Q. It doesn't report to the Intelligence Division?

A. No.

[30] Q. On the 14th of March, 1974, were you familiar with the regulations which governed the obtaining of approval for electronic monitoring?

A. Yes, I was.

Q. On March 14, did you seek authorization from any person to electronically monitor any telephone conversations with Dr. Caceres?

A. I am not sure if we did on that date or not, no.

Q. There is a telephone conversation in the file on March 21, 1974. Do you recall the first telephone conversation that was monitored between Mr. Yee and Dr. Caceres?

A. Probably was the one on March 21. I only recall one conversation between the two of them in March of '74.

Q. Let's cee if we can tie that down a little bit.

You recall only one conversation monitored between Agent Yee and Dr. Caceres in March of 1974; is that right?

A. Yes.

Q. Do you recall any other telephone conversations which were monitored in the year 1974 between the two men?

A. No, I do not.

Q. Now had you obtained written authority—written authority—from the regional inspector or the assistant regional inspector before that monitoring on March 21, 1974?

A. Written authority, I am not sure. I would have received oral authority.

[31] Q. But as to written authority, you are not sure whether you received that or not?

A. No, I am not.

Q. Can you tell us whether or not you had put in a written form for authority before that date?

A. No. No, I could not be sure.

Q. You just don't know whether you did or not.

A. Not the written, no.

I do know about the oral.

Q. Have you reviewed any documents before coming to testify here today?

A. Yes, I did look at the request.

Q. And that does not refresh your recollection, I take it.

A. I don't recall on that specific one if it had been submitted prior.

MR. BROSNAHAN: May I approach the witness, Your Honor?

THE COURT: You may.

MR. BROSNAHAN: Q. Agent Hill, I show you what has been marked as Defendant's Exhibit A and ask you whether you can identify that document for us.

A. Yes, it appears to be a document I prepared.

Q. What form is that?

A. It is Form M-5658-A.

[32] Q. And up at the top it shows a type of request, extension. Do you see that?

A. Yes, I do.

Q. What does that mean?

A. It would indicate that there had been prior requests submitted.

Q. Now the date in the upper right-hand corner is 3/21/74. Is that the date this form was made out?

A. Yes.

Q. It is signed in the lower right-hand corner by a Mr. Cohen. Do you see that?

A. Yes.

Q. Who is Mr. Cohen?

A. Barry Cohen was the assistant regional inspector in charge of security at that time.

Q. Can you tell us on what day Mr. Cohen signed it?

A. No, I can't.

Q. From any evidence or material that you have or recollection in any way, can you tell us when he signed it?

A. No, I can't.

Q. Can you tell us whether or not he signed it before you monitored the conversation between Mr. Caceres and Mr. Yee on March 21, 1974?

A. No, I can't.

Q. Can you tell us whether or not what you did was [33] monitor the telephone conversation and then call up the assistant regional director and get authority?

A. No, that would not have been the case.

Q. You are sure about that?

A. Yes.

Q. Where is Mr. Cohen today?

A. He is in Washington, D.C.

Q. Does he have a position with the Government?

A. Yes, he does.

Q. What is his title?

A. He is assistant director of internal security.

Q. You recall that you called Mr. Cohen before you monitored the telephone conversation on March 21?

A. I probably would not have called him. His office was next to my office, there, and I probably would have spoken to him in person.

Q. Did you talk with him personally or somebody in his office?

A. It would have been him.

Q. Do you recall that it was he that you talked to and got authority from him?

A. On that specific case, no, or that specific date, I couldn't be sure it was him. My form says it was the assistant regional inspector.

Q. Who else might it have been if it were not Mr. Cohen?

[34] A. It couldn't have been anyone. It doesn't say acting, so there would have been no one acting in his place.

Q. You have no specific recollection of having asked Mr. Cohen in person for authority to monitor on March 21, 1974?

A. No, sir, not on that date.

Q. And you are unable to tell us, I take it, based on your recollection, who you did ask.

A. No, not of my recollection, just by the form, itself.

Q. I show you Defendant's Exhibit B, if I may, and ask you to identify that for us. What is that?

A. That is a memorandum that I wrote on March 21.

Q. It is to the assistant regional inspector, isn't it?

A. Yes, it is.

Q. The telephone call that was monitored was at 9:20 to 9:30 in the morning; isn't that right?

A. Between those times, yes.

Q. Before you monitored the telephone conversation between 9:20 and 9:30 in the morning, had you typed out Defendant's Exhibit A, which is the authorization form?

A. No, I wouldn't have typed it under any circumstances.

Q. I would hope not. But did anybody type it up before 9:20 in the morning?

A. I couldn't be sure.

Q. You didn't present a written form to anyone for [35] authorization before the telephone call on March 21, did you?

A. No.

Q. It was all oral?

A. Yes.

Q. Now may I show you Defendant's Exhibit C and ask you if you will identify that for us.

A. Yes, that is a copy of a memorandum that I wrote on January 31, 1975.

Q. Who was that to?

A. The assistant regional inspector.

Q. And—

MR. WARD: I am sorry; may I see Defendant's C?

MR. BROSNAHAN: Certainly.

(Passing document.)

Q. Defendant's Exhibit C is a memorandum to the assistant regional inspector from you; is that right?

A. Yes.

Q. It is describing the fact that there has been some monitoring of telephone conversations; is that true?

A. Yes.

Q. Now I show you Defendant's Exhibit D and ask you if you can tell us what that is.

A. That is a request for authorization to use electronic equipment for telephone recording dated January 29, 1975.

[36] Q. Did you prepare that document?

A. Yes.

Q. Do you know who signed that document?

A. No, I don't; I don't recall.

Q. I show you Defendant's Exhibit E and ask you whether you can identify that for us, please.

A. Yes, that is a memorandum written by me to the assistant regional inspector dated January 29, 1975.

Q. I now show you Defendant's Exhibit F and ask you if you can tell us what that is.

A. That is a request for authorization to use electronic equipment for telephone monitoring dated January 28, 1975, from me to the assistant regional inspector.

Q. Agent Hill, when you were working with Agent Yee, who was calling on Dr. Caceres, was it your practice to talk with Agent Yee about what he was going to say in general before he talked to Dr. Caceres?

A. Yes, it was.

Q. Did you and he discuss what it would be good to say and what might not be good to say and rule out some things and include other things?

A. In general, yes.

Q. You heard Agent Yee's testimony in that regard, I take it?

A. Yes.

[37] Q. In the courtroom here this afternoon?

A. Yes.

Q. And you agree with the testimony as it relates to your conversations with him on the subject of what he was going to say.

A. Yes.

Q. I show you Defendant's Exhibit G and ask you if you can identify that document.

A. It is a request for authorization to use electronic equipment for telephone monitoring dated January 30, 1975, by me.

Q. By the way, had you ever applied to the assistant regional commissioner for authority of this kind before, in a case of this kind?

A. Assistant regional commissioner, you say?

Q. Yes. Had you ever applied to him before in any other case for authority like this.

A. To the assistant regional inspector.

Q. Inspector; thank you.

A. Possibly on one other occasion.

Q. Did you get the authority on that other occasion?

A. Yes, I believe so. I am not sure.

Q. I show you Defendant's Exhibit H and ask you if you can identify that.

A. It is a copy of a memorandum written by me dated [38] February 3, 1975, to the assistant regional inspector.

Q. And Defendant's Exhibit I?

A. A copy of a request for authorization to use electronic equipment for telephone monitoring dated February 5, 1975, from me to the assistant regional inspector.

Q. In the interest of time, is it fair to say that each one of these requests talks about a specific telephone call and trying to get authorization for that specific call rather than getting authority, let us say, for one month's time?

A. For all of them that we have gone over to this point, yes sir.

Q. So you never did seek on the telephone monitoring, you never did seek authority to cover a specific extended period of time.

A. Not prior to February '75, no.

Q. Was that because you didn't think you could get such authority?

A. No, our procedures did not allow for such authority at that time.

Q. I show you Defendant's Exhibit J and ask you if you will tell us what that is, please.

A. It is a memorandum dated February 6, 1975, from me to the assistant regional inspector regarding a telephone call by Agent Yee.

[39] Q. And, finally, Defendant's K, the first two pages of it, will you tell us what that is.

A. It is a copy of a request for authorization to use electronic equipment for telephone monitoring dated February 13, 1975, by me.

Q. And who was C. Arnold Decker, who is shown as signing in the right-hand corner?

A. He would have been the acting assistant regional inspector.

Q. He was the acting assistant.

A. Acting assistant regional inspector.

Q. So he did not hold the position of assistant regional—

A. Inspector, no.

Q. —inspector.

A. No.

Q. Do you know of any regulation which allows authorization to be given by an acting assistant regional inspector?

A. I believe the handbook, yes, our Internal Revenue Manual.

Q. Could you identify the third page of Defendant's Exhibit K for us, please.

A. It is a copy of a memorandum by me too, apparently, it is undated, this copy, but it shows that I initialed it [40] on February 18, 1975.

Q. And what is that document, sir?

A. It is a memorandum regarding recorded telephone calls by Agent Yee to Mr. Caceres.

Q. Do you know of any other documents that I have not shown you which relate to any authorization given for the monitoring of any telephone conversations between Agent Yee and Dr. Caceres?

A. I don't think so. I think you have covered all of the conversations that were monitored.

Q. Now, Agent Hill, you were aware, were you not, that a different procedure for authorization was required in the case of in-person monitoring than in a case of telephone monitoring; isn't that so?

A. Yes.

Q. At any point in your education within the Service, had anyone given you a course on these regulations of any kind?

A. It was possibly covered in a basic course that I attended in 1971.

Q. Was it mentioned at that time that in-person monitoring required the approval of the Attorney General of the United States?

A. I am sure that it would have been, yes.

Q. Were you told at that time that since the approval of the Attorney General of the United States or assistant [41] attorney general designated by him was required, that it would only be given in very rare cases?

A. No, I don't recall that.

Q. Directing your attention to January 31, 1975, which is an in-person monitoring when Agent Yee talked

to Dr. Caceres, did you talk to Agent Yee just before that monitoring took place.

A. The one of January 31?

Q. Yes.

A. Yes.

Q. Isn't this what happened, Agent Hill, that Agent Yee had been telling Dr. Caceres that he had to put his report in right away and the tax case would have to go to the Appellate Division? Do you recall that?

A. From what I recall, he had told him that it would go in as unagreed and that it would be under the process of unagreed cases.

Q. You had actually been monitoring telephone conversations in which Agent Yee was telling Dr. Caceres that he was going to send it in and it would have to go unagreed and it would go to the Appellate Division isn't that right?

A. I don't recall the Appellate. I recall him talking about unagreed and going through the conferee stage.

Q. Fine.

Now didn't you talk to Agent Yee sometime shortly [42] before January 31, 1975, and tell him to call up Dr. Caceres and tell him that he, Agent Yee, would exercise more latitude on the question of settling this case?

A. I don't recall specifically a conversation about more latitude, no.

Q. You heard the part of the transcript which I read to Agent Yee a moment ago which talked about "Perhaps I, Yee, can exercise more latitude or show more latitude in the matter?" Did you hear that conversation?

A. Yes, I did.

Q. You knew that Agent Yee was going to do that on the phone before he did it, didn't you?

A. Not using, not the specific word, no sir.

Q. Not using the specific word, but you knew, Agent Hill, that Agent Yee was going to call up Dr. Caceres and indicate to him that he had some flexibility, didn't you?

A. I am not sure that I knew that, no.

Q. Agent Hill, isn't it true that you and Agent Yee together agreed that it was time for Agent Yee to call up and show that he had some flexibility or latitude in his position so far as Dr. Caceres was concerned?

Isn't that true?

A. There was a discussion as far as flexibility as far as the deadline that he had previously been given.

Q. And you approved of a plan whereby Agent Yee would [43] call up and indicate more flexibility as to the deadline that he had given; isn't that right?

A. In general, yes sir.

Q. That was, you say, in general, the subject of a specific discussion between you and Agent Yee; isn't that right?

A. It would have been part of a discussion.

Q. And if that discussion had never taken place, the matter would have gone up for conference, it would have been out of the hands of Agent Yee; isn't that right?

A. If it had gone beyond the deadline, yes.

Q. So you were making a policy decision at that point that the matter should continue between Agent Yee and Dr. Caceres; isn't that right?

A. Not necessarily, no. That was not—

Q. You say, "Not necessarily." Weren't you in charge of the investigation?

A. I was the case inspector. That did not mean I had the right or the authority of making all the decisions in the case.

Q. But you did make a decision that Agent Yee would continue to consult with Dr. Caceres, didn't you?

A. In the last week in January, yes.

Q. Now you heard in the transcript where Agent Yee called up and talked about the meeting with Dr. Caceres the [44] very next day, didn't you?

A. Yes.

Q. Did you have authority from the Attorney General of the United States at that point to conduct monitoring in person?

A. No, I didn't.

Q. Did you have authority from an assistant attorney general who had been designated by the attorney general to do this monitoring?

A. On January 30, is that the date?

Q. Yes.

A. No.

Q. Did you obtain any written authorization from either the Attorney General of the United States or an Assistant Attorney General of the United States designated by him for authority to monitor the in-person conversation between Agent Yee and Dr. Caceres which took place on January 31, 1975? Did you have any such authority before that monitoring took place?

A. Not written, no.

Q. Had you filled out any forms to seek such authority before that monitoring took place?

A. Yes.

Q. What had you done with those forms?

A. They had been passed up through the channels of [45] supervisor to the assistant regional inspector.

Q. Had you talked to anyone to try to get authority for the monitoring on January 31?

A. Yes.

Q. Who did you talk to?

A. My supervisors and whoever was in the assistant regional inspector's office, either Mr. Cohen or whoever was acting then.

Q. Did you talk to anybody in the office of the Director of Internal Security Division?

A. No, I would not have.

Q. Do you know whether anybody did?

A. I was told they did.

Q. Do you know who it was that talked to the Director of Internal Security Division?

A. I thought it was Mr. Cohen.

MR. BROSNAHAN: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. BROSNAHAN: Q. May I show you, Agent Hill, Defendant's Exhibit L, and ask you to identify that for us, please.

A. That is a request for authorization to use electronic equipment dated January 31, 1975.

Q. That is a Form 5177, isn't it?

[46] A. Yes.

Q. And it is filled out, made out on January 31, 1975?

A. Yes.

Q. And it attaches an affidavit, doesn't it?

A. Yes, it does.

Q. From Agent Yee?

A. Yes.

Q. That affidavit was filled out on the 20th [sic] day of January, 1975.

A. That is correct.

Q. Why did you have Agent Yee fill out an affidavit on January 28, 1975?

A. It concerned the events that Agent Yee told us happened on January 27, 1975, during a meeting between him and Mr. Caceres.

Q. Why did you have him fill out an affidavit?

A. To have the information in writing and sworn to by Mr. Yee.

Q. You wanted to have him under oath?

A. Yes, I did.

Q. I direct your attention to Page 5 and ask you what that document is.

A. That is a memorandum dated January 31, 1975, from the assistant regional inspector to the office of the assistant commissioner of inspections, attention of the [47] Director of Internal Security.

Q. That would have been made out in San Francisco?

A. Yes.

Q. On January 31, 1975?

A. Yes.

Q. The last paragraph, if I may, reads as follows:

> "The Director of Internal Security was telephonically advised of a meeting by the assistant regional inspector, internal security, western region, at the earliest opportunity, 8:15 a.m., January 31, 1975. The Director approved the use of electronic equipment at that time."

Do you see that?

A. Yes.

Q. Would you identify the last document, please, which is attached to Defendant's Exhibit L.

A. It is a copy of a memorandum dated February 3rd, 1975, from the regional inspector to the office of the assistant commissioner of inspections.

Q. Now from reviewing these documents, do you recall that no written authorization form was submitted to anyone in the Government before the in-person conversation was monitored on January 31, 1975?

A. The request was.

Q. You typed a request on January 31, 1975, didn't you?

[48] A. No, I did not type it.

Q. You caused it to be typed?

A. Yes, on the 31st or possibly even the 30th.

Q. Why do you say, "possibly the 30th"?

A. Well, the date at the top would have been the date of signing by the regional inspector.

Q. Agent Hill, do you have some recollection that is so or are you just giving us your best guess?

A. No, that is just—

Q. Let me ask you a procedure with regard to your office as distinguished from other offices.

When a document is being typed and the date is typed in, isn't it usually the day that it is being typed that it is filled in?

A. Not in our office.

Q. Do you usually type it some days before that or after that or what is your procedure?

A. The date is usually dictated by the date of the signature.

Q. Is the form filled out first and then signed?

A. Yes.

Q. Does it then go back to have the date filled in?

A. Possibly.

Q. Possibly? Does it or doesn't it?

A. I don't know. I don't type it.

[49] Q. I am just asking about what you do in your office. Just tell us what you do in your office.

A. Once I submit it for typing, I probably would not see it again. It would be signed and dated and forwarded.

Q. So that when you see it, as far as your procedure is concerned, everything is typed in; isn't that right?

A. Yes.

Q. Now isn't this what happened, that that form was typed on January 31, 1975, in your office?

A. It could have been, yes.

Q. And that was in San Francisco?

A. Yes.

Q. That was not trasmitted to anyone in Washington on that day, was it?

A. I believe it was.

Q. Was it received by anyone in Washington on that day, January 31, 1975?

A. I believe it was.

Q. And what do you base that on?

A. There is a notation on the second or third page regarding the document being faxed to Washington.

Q. Can you show us where that is, please?

A. That is on the copy of the memorandum dated January 31, 1975. The notation at the top says, "1/31/75, faxed to NO, National Office."

[50] Q. Do you know what time that was received in Washington?

A. No, I don't.

Q. Do you know whether it was received before or after the monitoring took place?

A. No, I don't.

Q. You didn't undertake any steps to make sure that the written document was received in Washington before the monitoring took place, did you?

A. No.

Q. I show you Defendant's Exhibit M and ask you if you will identify that for us, please.

A. It is a copy of a memorandum dated February 6, 1975, from the assistant regional inspector to the permanent file. P. F. is shown on the memorandum.

Q. Again, it is talking about emergency approval?

A. Yes.

Q. Did you ever fill out a document which explained a need for emergency approval?

A. There is a memorandum attached to the January 31, 1975, request, I believe.

Q. Could you show us that, please?

A. Yes, it is the same memorandum that has the notation of faxed on top.

Q. I direct your attention to the second paragraph [51] of this document.

First of all, did you help prepare this document?

A. I am sure that I did. I don't recall it specifically.

Q. That is a memo from Mr. Barry Cohen, the Assistant Regional Inspector, to the office in Washington, isn't it?

A. Yes.

Q. The office, that is, of Director of Internal Security Division?

A. Yes.

Q. And I quote this language:

> "Approximately 5:15 p.m. on January 30, 1975, during a telephone conversation between Mr. Yee and Mr. Caceres, a meeting between them was scheduled for 2:00 o'clock p.m. on January 31, 1975. Due to previous conversations between them, a meeting at a later date would not be practical or keeping in character with Mr. Yee, possibly defeating the purpose of monitoring the meeting."

Do you see that?

A. Yes, I do.

Q. Did you put in this document anywhere the statement that Mr. Yee had set up this meeting for just the very next day?

A. No, I didn't.

Q. Was that because you didn't want them to know that [52] in Washington?

A. No.

Q. Has anybody in Washington, either in the Director's Office, the Attorney General's Office, or any assistant attorney general, ever been informed that Mr. Yee, on the three occasions where the in-person monitoring was done, was the person who suggested the meeting be held the very next day?

A. I wouldn't know that.

Q. You have no information on that subject?

A. No, I don't know.

Q. I was not there during the conversation with anyone in the Director's Office.

Q. In the one written document that is in front of you which you helped prepare, it doesn't say anything about that, does it?

A. No.

Q. Could you identify Defendant's Exhibit N for us, Mr. Hill?

A. It is a copy of a memorandum dated February 12, 1975, to the regional inspector from the office of the assistant commissioner of inspections.

Q. What does that cover?

A. From the acting director. It says that the Criminal Division, Department of Justice, telephonically advised that the deputy assistant attorney general had [53] authorized the use of electronic equipment in the captioned case 30 days again, January 11, 1975; advising was done on February 11, 1975.

Q. And directing your attention to Defendant's O, could you tell us what is?

A. That is a copy of a memorandum dated February 12, 1975, from the regional inspector, western region, to the office of the assistant commissioner of inspections, to the attention of the Director of the Internal Security Division.

Q. And Defendant's Exhibit P, can you tell us what that is, the first part, second part and the third part, if you can identify those for us.

A. The first one is a writing slip to me from Mr. Cohen transmitting another document.

The second document is a copy of a memorandum dated February 27, 1975, to the regional inspector, western region, from the senior coordinator, field coordination branch. It would be in the office of the assistant commissioner of inspection. That memorandum is transmitting another memorandum.

The other memorandum is dated February 7, 1975, to the assistant attorney general, Criminal Division, from the Director of Internal Security Division regard-

ing notification of emergency approval of conceptual use of [54] electronic equipment and request for further use.

Q. Directing your attention to the lower left-hand corner of the third page of Defendant's Exhibit P, can you tell us whose signature that bears?

A. No, I can't. The title is deputy assistant attorney general.

Q. The document does not bear a signature anywhere from assistant attorney general, does it?

A. No.

Q. Or from the attorney general?

A. No.

Q. Mr. Hill, you have never seen a document in this whole case, have you, which has the authorizing signature of either an attorney general of the United States or an assistant attorney general of the United States; isn't that true?

A. No, I don't believe I have.

Q. Thank you.

MR. BROSNAHAN: That is all I have.

CROSS-EXAMINATION

BY MR. WARD:

Q. Mr. Hill, referring to the subject of the telephone calls, the monitoring of the telephone calls, and referring particularly to the calls that have been set forth on this exhibit and the calls that have been enumerated in [55] the defendant's motion and memorandum, did you ever authorize or participate in the monitoring of any of those phone calls without first receiving authorization from the regional inspector or assistant regional inspector of the Internal Security Division?

A. No, I didn't other than possibly an acting assistant regional inspectōr on one case.

Q. Were those authorizations verbal or in writing?

A. They would have been verbal.

Q. To your knowledge, did the acting regional inspector, Mr. Decker, have the same powers and authority that the regional inspector, himself, had?

A. Yes.

Q. After each authorized telephone monitoring, was a follow-up memorandum written by yourself discussing what had happened in the monitoring, written and presented to the assistant regional inspector?

A. Yes.

Q. And was that done in each instance in writing?

A. Yes.

Q. With respect to the face-to-face meetings between Dr. Caceres and Agent Yee, did you ever authorize or permit a face-to-face meeting to take place without having received approval or authorization from either the Director of the Internal Security Division—

[56] I will strike that and rephrase the question.

Pertaining to the meetings which took place on January 31 and on February 6, did you authorize either of those face-to-face meetings without having first received approval or authority from the Director of the Internal Security Division?

A. No, I didn't authorize them without being told that the Director had approved them.

Q. In both of those instances prior to the meeing, you had received information from a superior of yours or someone in the Internal Security Department, which told you that the Director of the Internal Security Division had authorized the monitoring of the face-to-face meetings?

A. Yes.

Q. In each instance of those meetings—that is, January 31 and February 6—was a written authorization, a written request for authorization prepared by you and submitted prior to the meeting, itself?

A. A request was submitted prior to the meeting of January 31, yes.

Q. And what about February 6?

A. That would have been governed by the same written request.

Q. For what period of time did the written request prior to the January 31 meeting seek?

[57] A. 30 days.

Q. And I take it that prior to the February 6 meeting, you had had no response either in writing or verbally as to your 30-day request?

A. That is right.

Q. And was it for that reason that an emergency verbal permission was sought on February 5 or February 6?

A. Yes.

Q. Prior to the February 11 meeting between Dr. Caceres and Robert Yee, what information had come to you regarding the authority?

A. I was advised that the authority had been granted for the 30 days.

Q. That is in response to your original 30-day request on January 31?

A. Yes.

Q. By whom were you given that information, if you recall?

A. I don't recall. It would have come from the assistant regional inspector's office.

Q. As to each of these face-to-face meetings, were follow-up memorandum prepared by yourself or someone in inspection, here, and forwarded to Washington?

A. Yes.

Q. Would it have been to any advantage to you or [58] other inspectors to bypass the normal authorization procedures and implement the emergency authorization procedure?

A. No.

Q. Did you, in fact, ever participate in the setting of a meeting date with that in mind?

That is, bypassing the normal authorization procedures?

A. No.

Q. Would there have been any reason that you can think of why you would have wanted to bypass the normal authorization procedures?

A. No.

Q. In each instance in which you sought emergency authorization from the Director of the Internal Security Division, was the time remaining before the meeting took place less than 48 hours?

A. Yes.

MR. WARD: May I have just a moment, Your Honor?

THE COURT: You may.

MR. WARD: I have no further questions.

MR. BROSNAHAN: Just a couple of question, Your Honor.

REDIRECT EXAMINATION

BY MR. BROSNAHAN:

Q. Agent Hill, you put in a request for authority for [59] a 30-day period of time on January 31, 1975. Is that what you said?

A. Yes.

Q. And that is the request that you were talking about that covers the in-person monitoring on January 31, February 6, and February 11, 1975; is that right?

A. That is the written request, yes.

Q. And your written request under which you are seeking to prove that there is authority was a request for 30 days; isn't that right?

A. Yes.

Q. It was sent to Washington, as you indicated earlier, on the date of January 31, 1975.

A. Yes.

Q. That is more than 48 hours before February 6, 1975, isn't it?

A. Yes, it is.

Q. And it is more than 48 hours from the February 11 date shown here, isn't it?

A. Yes.

Q. And, of course, all of the 30-day period except for the first 48 hours is beyond the 48-hour emergency provision, isn't it?

A. Yes.

Q. You were familiar, were you not, with the [60] provision of the Code which provides that emergency authorization—that is, authorization other than from the attorney general—will only be granted where there is less than 48 hours available to get it?

A. Yes.

Q. You knew about that, I take it?
A. Yes.
Q. Fine. Thank you.
MR. BROSNAHAN: That is all.
MR. WARD: No further questions.
THE COURT: You may step down.

(Witness excused.)

MR. BROSNAHAN: That is all we have of this witness, Your Honor.

We have no other questions of any other witness. We have completed our factual presentation.

MR. WARD: May I have a few moments?
THE COURT: You may.

MR. WARD: Your Honor, I don't know if the defendant intends to offer the exhibits in evidence for the purpose of this hearing.

MR. BROSNAHAN: We do.
MR. WARD: I would join in that.
THE CLERK: Defendant's Exhibits A through P in evidence?
THE COURT: So ordered.

(Defendant's Exhibits A through P received in evidence.)

MR. WARD: I would like this marked.
THE CLERK: Plaintiff's Exhibit 1 for identification.
THE COURT: So ordered.

(Plaintiff's Exhibit 1 marked for identification.)

MR. WARD: Your Honor, Plaintiff's Exhibit 1 is a memorandum dated October 16, 1972, setting forth the monitoring of private conversations with the consent of a party. It is a memorandum of the Attorney General of the United States, and the Government would offer it into evidence at this time, apparently without objection from the defendant.

I would note particularly for the Court's observation the last page of this exhibit, which is a supplemental memorandum signed by Attorney General Elliott Richardson on 9/4/73, which amends a paragraph which is

set forth earlier in the memorandum. The amendment, in essence, sets forth that—well, I will just read a brief portion of it.

> "All federal departments and agencies shall, except in exigent circumstances as discussed below, obtain the advance authorization of the attorney general or any [62] designated assistant attorney general or deputy [sic] attorney general before using any mechanical or electronic devices to overhear, transmit, or record private conversations other than telephone conversations without the consent of all participants."

I would offer that into evidence at this time.
MR. BROSNAHAN: No objection, Your Honor.
THE CLERK: Plaintiff's Exhibit 1 in evidence?
THE COURT: So ordered.

(Plaintiff's Exhibit No. 1 received in evidence.)

MR. BROSNAHAN: May we argue, Your Honor?

THE COURT: I would suggest putting the matter over to Wednesday at 10:00 o'clock. Is that agreeable?

MR. WARD: That is satisfactory.

MR. BROSNAHAN: I have a conflict at that time, Your Honor.

THE COURT: How long will it take for the argument?

MR. BROSNAHAN: I will be happy to be here Wednesday at 10:00 o'clock, Your Honor.

THE COURT: We will start at 11:00 if you wish.

MR. BROSNAHAN: No, 10:00 is better than 11:00. I will take 10:00. 10:00 will be fine. Thank you.

THE COURT: We will be in recess.

Request for Authorization to Use Electronic Equipment for Consensual Telephone Monitoring	TYPE OF REQUEST ☐ Initial ☒ Extension	REGION Western	DATE 3/21/74

TO

Assistant Regional Inspector
Internal Security Division

CASE TITLE AND NUMBER

Alfredo L. CACERES 7-0374-0220
2395 Ocean Avenue
San Francisco, California

FROM

William A. Hill Inspector

COOPERATING EMPLOYEE'S NAME
Robert YEE, IRA
San Francisco District

Authorization is hereby requested for the use of electronic equipment in connection with above subject case.

BEGINNING DATE: 3/15/74

DATE(S) OF PREVIOUS AUTHORIZATION: None

REASON FOR SUCH PROPOSED USE

On 3/14/74, IRA ROBERT YEE, San Francisco District, Oakland POD, reported that on 3/14/74 he met with ALFREDO L. & DORIS CACERES at Dr. CACERES' office re audit of their 1971 U.S. Individual Income Tax Return to propose tax adjustments and resulting tax deficiencies. Mr. YEE said that after Mrs. CACERES left the office Dr. CACERES mentioned resolving the tax matter with a "personal settlement", and said he would agree to give $200 to the IRS and $500 to Mr. YEE rather than to agree to the tax deficiency of approximately $3000.00 as proposed. Mr. CACERES mentioned "personal settlements" several times during later conversation, said his wife did not know of his offer to Mr. YEE, and that "personal settlements" were common.

It is proposed to monitor and record a telephone conversation between Mr. YEE, calling from the Regional Inspector's Office, 415-556-0188, to Dr. CACERES' offices, 2395 Ocean Avenue, San Francisco, telephone 415-334-0385 and 553 San Rafael Avenue, Belvedere, California, telephone 415-435-4710, and possibly to Dr. CACERES' residence, 1 Golden Gate Avenue, Belvedere, telephone 415-435-0603, on 3/21/74. Mr. YEE will attempt to arrange a personal meeting with Dr. CACERES for 3/27/74.

Verbal permission for the use of electronic equipment was granted by the Assistant Regional Inspector, Western Region on 3/19/74.

TYPE OF EQUIPMENT TO BE USED

Induction coil
Dictaphone Cassette Recorder

NAMES OF PERSONS INVOLVED	(1) Robert Yee, IRA San Francisco	(3)
	(2) Alfredo L. Caceres 2395 Ocean Ave., S.F., California	(4)

PROPOSED LOCATION OF EQUIPMENT

Office of Regional Inspector
160 Pine St., Suite 500, San Francisco, California

DURATION OF PROPOSED USE

3/21/74

MANNER OR METHOD OF INSTALLATION

Induction coil to be affixed to telephone instrument number 415-556-0188
and attached to Dictaphone recorder

Attachment(s):	Copies to: Chief DIR (IS) FCB Regional File Case Inspector	No trespass will be involved. APPROVING OFFICIAL'S SIGNATURE ▶

Form M-5658-A (7-73) Department of the Treasury - Internal Revenue Servic

Def't NO. 75-129 A
Exhibit No.
Filed DEC 9 - 1975
William L. Whittaker, Clerk
By P. C. Glover
Deputy Clerk

DEFT. EXHIBIT B

MEMORANDUM

[Mar. 21, 1974]

to: Assistant Regional Inspector (IS), Western Region

from: Inspector W. A. Hill

subject: Alfredo L. CACERES
San Francisco, California
7-0374-0220 p/f

Use of Electronic Equipment for Consensual Telephone Monitoring

On 3/21/74, between 9:20 and 9:30 a.m., ROBERT YEE, Revenue Agent, made telephone calls to the business offices and residence of ALFREDO L. CACERES from the Office of the Regional Inspector, San Francisco, telephone number 556-0188. The telephone used by Mr. YEE was monitored and the conversations recorded by Inspector M. STEVENS with Mr. YEE's permission.

The calls to Dr. CACERES' offices at 553 San Rafael Avenue, Belvedere, California, and 2395 Ocean Avenue, San Francisco, were answered by employees of Dr. CACERES who claimed he was not in the office. Attempted call to Dr. CACERES' residence at 1 Golden Gate Avenue, Belvedere, was not completed.

At 11:33 a.m., 3/21/74, Mr. YEE completed a call to Dr. CACERES at his office, 553 San Rafael Avenue, Belvedere. Mr. YEE requested additional records from Dr. CACERES and a meeting between Mr. YEE and Dr. CACERES was scheduled for 3/28/74 at 2:00 p.m. at Dr. CACERES' office in Belvedere.

/s/ W. A. Hill
W. A. HILL
Internal Revenue Service

DEPT. EXHIBIT C

MEMORANDUM

[Jan. 30, 1975]

to: Assistant Regional Inspector (IS), Western Region

from: Inspector W. A. Hill

subject: ALFREDO L. CACERES
San Francisco, California
7-0374-0220 p/f

On January 29, 1975, at 4:31 p.m., Revenue Agent ROBERT YEE initiated a telephone call to the residence of ALFREDO L. CACERES, 1 Golden Gate, Belvedere, 415-435-0603, from the Office of the Regional Inspector, San Francisco, 415-556-4057. The call was answered by Mrs. CACERES who advised Mr. CACERES was not in.

At 4:36 p.m., January 29, 1975, Mr. YEE initiated a telephone call to Mr. CACERES at his office, 2395 Ocean Avenue, San Francisco, 415-334-0385, from telephone number 556-4057.

The above calls were monitored and the conversations recorded by Inspector M. STEVENS, with Mr. YEE's permission. An induction coil and a Sony Cassette Recorder, serial number 26737, were used for recording. Verbal permission for the use of electronic recording equipment was given by the Executive Assistant to the ARI, IS, prior to the calls. At the time permission was granted, the Executive Assistant was Acting Assistant Regional Inspector.

/s/ W. A. Hill
W. A. HILL
Internal Revenue Service

Request for Authorization to Use Electronic Equipment for Consensual Telephone Monitoring	TYPE OF REQUEST ☐ Initial ☒ Extension	REGION Western	DATE 1/29/75

TO

Assistant Regional Inspector
Internal Security Division

CASE TITLE AND NUMBER

ALFREDO L. CACERES 7-0374-0220
2395 Ocean Avenue
San Francisco, California

FROM

William A. Hill Inspector

COOPERATING EMPLOYEE'S NAME

ROBERT YEE, IRA
San Francisco District

Authorization is hereby requested for the use of electronic equipment in connection with above subject case.	BEGINNING DATE 3/15/74	DATE(S) OF PREVIOUS AUTHORIZATION 3/15/74, 1/27/75, 1/28/75

REASON FOR SUCH PROPOSED USE

To record a telephone conversation between IRA ROBERT YEE, calling from the Regional Inspector's Office, 415-556-4057, to Mr. ALFREDO L. CACERES at his residence, 1 Golden Gate, Belvedere, 415-435-0603, or his offices, 553 San Rafael Avenue, Belvedere, 415-435-4710, or 2395 Ocean Avenue, San Francisco, 415-334-0385, on 1/29/75.

On 3/14/74 IRA YEE advised that on that date, after a meeting with Mr. and Mrs. CACERES regarding the audit of their 1971 U.S. Individual Income Tax Return, Mr. CACERES suggested resolving the tax matter with a "personal settlement", and said he would agree to give $200 to IRS and $500 to Mr. YEE, rather than to agree to the tax deficiency. Mr. CACERES mentioned "personal settlements" several times during the conversation. Mr. YEE ignored the offers.

On 1/27/75 Mr. YEE advised that, after a meeting with Mr. and Mrs. CACERES, on that date, regarding their tax audit, Mr. CACERES again discussed "personal settlements", offered to give Mr. YEE $1000 and the government $1000, rather than to give all of the proposed tax deficiency to the government, and repeatedly asked Mr. YEE to consider the offer. Mr. YEE responded with various replies, including: "I will think about it"; "No"; and "I don't know".

TYPE OF EQUIPMENT TO BE USED

Induction coil
Sony Cassette Recorder

NAMES OF PERSONS INVOLVED	(1) ROBERT YEE, IRA San Francisco District	(3)
	(2) ALFREDO L. CACERES 2395 Ocean Ave., San Francisco, CA	(4)

PROPOSED LOCATION OF EQUIPMENT

Office of Regional Inspector
160 Pine St., Suite 500, San Francisco, CA

DURATION OF PROPOSED USE

1/29/75

MANNER OR METHOD OF INSTALLATION

Induction coil to be affixed to telephone instrument 415-556-4057 and attached to Sony recorder.

Attachment(s):	Copies to: RI or DIR (IS) FCB Regional File Case Inspector	No trespass will be involved. APPROVING OFFICIAL'S SIGNATURE ▶

Form 5178 (9-73) Department of the Treasury - Internal Revenue Service

NO. 75-129 D
Exhibit No.
Filed DEC 8 - 1975
William L. Whittaker, Clerk
By P. C. Acuna
Deputy Clerk

DEFT. EXHIBIT E

[Jan. 29, 1975]

Assistant Regional Inspector, Internal Security, Western Region

Inspector W. A. Hill

CACERES, ALFREDO L.
San Francisco, California

7-0374-0220

On January 28, 1975, between 9:10 a.m. and 2:50 p.m., Internal Revenue Agent ROBERT YEE initiated 15 telephone calls to the residence of ALFREDO CACERES, 1 Golden Gate, Belvedere, California, telephone number 435-0603, from the Office of the Regional Inspector, 160 Pine St., San Francisco, telephone number 556-4057. The calls were not completed as a busy signal was heard or the telephone was not answered.

On January 28, 1975, Mr. YEE initiated three telephone calls to the office of Mr. CACERES, 2395 Ocean Avenue, San Francisco, telephone number 334-0385, from the telephone number 556-4057. The person answering advised that Mr. CACERES was not in and had not contacted that office this date.

On January 28, 1975, Mr. YEE initiated two telephone calls to the office of Mr. CACERES, 553 San Rafael Avenue, Belvedere, telephone number 435-4710, from telephone number 556-4057. The person answering advised that Mr. CACERES was not at that office.

At 2:58 p.m., January 28, 1975, Mr. YEE completed a telephone call to Mr. CACERES at his residence, 1 Golden Gate Avenue, Belvedere, telephone number 435-0603. The tax issues of Mr. CACERES' tax audit were discussed and Mr. CACERES requested that Mr. YEE consult his supervisor for approval of an extension of time before the audit was submitted for processing. The call was concluded at 3:44 p.m. At 3:58 p.m. Mr. YEE again called Mr. CACERES, allegedly with his supervisor's recommendation that the audit was to be closed

prior to February. They further discussed the tax issues and the call was concluded at 4:15 p.m. with Mr. CACERES agreeing to call Mr. YEE on January 29, 1975, with a final decision.

The above telephone calls, all initiated from the Office of the Regional Inspector, 160 Pine St., San Francisco, telephone number 556-4057, were monitored and recorded by Inspector M. STEVENS, with Mr. YEE's permission. An induction coil and a Sony cassette recorder, serial number 26737, were used to record the conversations. Verbal approval for the use of electronic recording equipment was given by the Assistant Regional Inspector, Internal Security, on January 27, 1975.

/s/ W. A. Hill
W. A. HILL

Request for Authorization of Electronic Equipment for Consensual Telephone Monitoring

[X] Extension | Western | 1/28/75

TO
Assistant Regional Inspector
Internal Security Division

CASE TITLE AND NUMBER
ALFREDO L. CACERES 7-0374-0220
2395 Ocean Avenue
San Francisco, California

FROM
W. A. Hill — Inspector

COOPERATING EMPLOYEE'S NAME
ROBERT YEE, IRA
San Francisco, California

Authorization is hereby requested for the use of electronic equipment in connection with above subject case.

BEGINNING DATE: 3/15/74

DATE(S) OF PREVIOUS AUTHORIZATION: 4/74 - 12/74, 1/27/75

REASON FOR SUCH PROPOSED USE

It is proposed to record a telephone conversation on 1/28/75 between IRA ROBERT YEE, calling from the Regional Inspector's Office, 415-556-4057, and ALFREDO L. CACERES. The calls may be made to Mr. CACERES' offices, 2395 Ocean Avenue, San Francisco. 415-334-0385, 553 San Rafael Avenue, Belvedere, 415-435-4710, or to his residence, 1 Golden Gate Avenue, Belvedere, 415-435-0603. The call is to be made for the purpose of arranging a meeting between Mr. YEE and Mr. CACERES.

On 3/14/74 Mr. YEE reported that he met with Mr. and Mrs. CACERES at Mr. CACERES' office on that date re the audit of their 1971 U.S. Individual Income Tax Return. Mr. YEE said that, after Mrs. CACERES left the office Mr. CACERES suggested resolving the tax issue with a "personal settlement", and said he would agree to give $200 to the IRS and $500 to Mr. YEE, rather than agreeing to a possible tax deficiency of $3000 as proposed. Mr. YEE ignored the offer.

On 1/27/75 Mr. YEE reported that he met with Mr. and Mrs. CACERES, and their accountant, CHARLES D. POOLEY, at Mr. POOLEY's office on that date. Mr. YEE said that after the meeting, and as he was leaving the office, Mr. CACERES approached him alone, engaged in conversation regarding the audit, and again suggested a possible "personal settlement" to resolve the audit. Mr. YEE said Mr. CACERES offered $1000 to him and $1000 to the

(Continued)

TYPE OF EQUIPMENT TO BE USED
Induction Coil
Sony Cassette Recorder

NAMES OF PERSONS INVOLVED
(1) ROBERT YEE, IRA
San Francisco
(2) ALFREDO L. CACERES
2395 Ocean Ave., San Francisco
(3)
(4)

PROPOSED LOCATION OF EQUIPMENT
Office of Regional Inspector
160 Pine St., Suite 500, San Francisco

DURATION OF PROPOSED USE
1/28/75

MANNER OR METHOD OF INSTALLATION
Induction coil to be affixed to telephone instrument 415-556-4057 and attached to Sony Recorder

Attachment(s):

Copies to:
RI or DIR (IS)
FCB
Regional File
Case Inspector

No trespass will be involved.

APPROVING OFFICIAL'S SIGNATURE ▶

Form 5178 (9-73) Department of the Treasury - Internal Revenue Service

Deft: NO. 75-1294 Exhibit No.
Filed DEC 8 - 1975
William L. Whittaker, Clerk
By P. C. Deputy Clerk

REASON FOR SUCH PROPOSED USE

U.S. government as a "personal settlement". Mr. CACERES conversed with Mr. YEE for approximately 1½ hours, repeatedly offering money to Mr. YEE to resolve the audit in his favor. Mr. YEE repeatedly ignored the offer, said he would think about it, and at one time said he would not accept the offer. When Mr. CACERES asked if that was his final answer he replied that he didn't know.

The ARI(IS) gave verbal approval for the use of electronic equipment on 1/27/75.

Request for Authorization to Use Electronic Equipment for Consensual Telephone Monitoring	TYPE OF REQUEST ☐ Initial ☒ Extension	REGION Western	DATE 1/30/75

TO

Assistant Regional Inspector
Internal Security Division

CASE TITLE AND NUMBER

ALFREDO L. CACERES 7-0374-0220
2395 Ocean Avenue
San Francisco, California

FROM

William A. Hill Inspector

COOPERATING EMPLOYEE'S NAME

ROBERT YEE, IRA
San Francisco District

Authorization is hereby requested for the use of electronic equipment in connection with above subject case.

BEGINNING DATE	DATE(S) OF PREVIOUS AUTHORIZATION
3/15/74	3/15/74, 1/27/75, 1/28/75

REASON FOR SUCH PROPOSED USE

To record a telephone conversation between IRA ROBERT YEE, calling from the Regional Inspector's Office, 415-556-4057, to Mr. ALFREDO L. CACERES at his residence, 1 Golden Gate, Belvedere, 415-435-0603, or his offices, 553 San Rafael Avenue, Belvedere, 415-435-4710, or 2395 Ocean Avenue, San Francisco, 415-334-0385, on 1/30/75.

On 3/14/74 IRA YEE advised that on that date, after a meeting with Mr. and Mrs. CACERES regarding the audit of their 1971 U.S. Individual Income Tax Return, Mr. CACERES suggested resolving the tax matter with a "personal settlement", and said he would agree to give $200 to IRS and $500 to Mr. YEE, rather than to agree to the tax deficiency. Mr. CACERES mentioned "personal settlements" several times during the conversation. Mr. YEE ignored the offers.

On 1/27/75 Mr. YEE advised that, after a meeting with Mr. and Mrs. CACERES, on that date, regarding their tax audit, Mr. CACERES again discussed "personal settlements", offered to give Mr. YEE $1000 and the government $1000, rather than to give all of the proposed tax deficiency to the government, and repeatedly asked Mr. YEE to consider the offer. Mr. YEE responded with various replied, including: "I will think about it"; "No"; and "I don't know".

TYPE OF EQUIPMENT TO BE USED

Induction coil
Sony Cassette Recorder

NAMES OF PERSONS INVOLVED		
(1) ROBERT YEE, IRA San Francisco District		(3)
(2) ALFREDO L. CACERES 2395 Ocean Ave., San Francisco, CA		(4)

PROPOSED LOCATION OF EQUIPMENT

Office of Regional Inspector
160 Pine St., Suite 500, San Francisco, CA

DURATION OF PROPOSED USE

1/30/75

MANNER OR METHOD OF INSTALLATION

Induction coil to be affixed to telephone instrument 415-556-4057 and attached to ~~Sony~~ LANIER recorder.

Attachment(s):	Copies to: RI or DIR (IS) FCB Regional File Case Inspector	No trespass will be involved. APPROVING OFFICIAL'S SIGNATURE ▶

Form 5178 (9-73) Department of the Treasury - Internal Revenue Service

Def't Exhibit No. 95-1294
Filed DEC 8 - 1975
William L. Whittaker, Clerk
By P.C. Grace
Deputy Clerk

DEFT. EXHIBIT H

[Feb. 3, 1975]

Assistant Regional Inspector, Internal Security
Inspector W. A. Hill

CACERES, ALFREDO L.
San Francisco, California

7-0374-0220 p/f

Between 2:14 p.m. and 3:37 p.m., January 30, 1975, Internal Revenue Agent ROBERT YEE initiated four telephone calls: one each to ALFREDO L. CACERES' residence, 1 Golden Gate Avenue, Belvedere, California, 415-435-0603; Mr. CACERES' office, 553 San Rafael Avenue, Belvedere, 415-435-4710; and two to Mr. CACERES' office, 2395 Ocean Avenue, San Francisco, 415-334-0385. The persons answering each of the calls advised that Mr. CACERES was not at that location.

Between 4:33 p.m. and 4:54 p.m., January 30, 1975, Mr. YEE initiated three telephone calls: two to Mr. CACERES' San Francisco office and one to his residence. Persons answering again advised that Mr. CACERES was not present.

At 5:10 p.m., January 30, 1975, Mr. YEE initiated a telephone call to Mr. CACERES at the San Francisco office, 415-334-0385. They scheduled a meeting at Mr. CACERES' office for 2:00 p.m. on January 31, 1975.

The above telephone calls were monitored and recorded by Inspector M. Stevens, with Mr. YEE's permission. An induction coil and a Lanier cassette recorder, serial number 4104941, for the first four calls, and a Sony cassette recorder, serial number 26737, were used to record the calls. Verbal approval for the use of recording equipment was given by the Acting Assistant Regional Inspector, Internal Security, on January 30, 1975, prior to the initiation of the calls.

/s/ W. A. Hill
W. A. HILL

Request for Authorization to Use Electronic Equipment for Consensual Telephone Monitoring	TYPE OF REQUEST ☐ Initial ☒ Extension	REGION Western	DATE 2/5/75
TO Assistant Regional Inspector Internal Security Division	CASE TITLE AND NUMBER ALFREDO L. CACERES 7-0374-0220 2395 Ocean Avenue San Francisco, California		
FROM William A. Hill Inspector	COOPERATING EMPLOYEE'S NAME ROBERT YEE, IRA San Francisco District		
Authorization is hereby requested for the use of electronic equipment in connection with above subject case.	BEGINNING DATE 3/15/74	DATE(S) OF PREVIOUS AUTHORIZATION 25 - 3/15/74-1/30/75	

REASON FOR SUCH PROPOSED USE

To record a telephone conversation between IRA ROBERT YEE, calling from the Regional Inspector's Office, 415-556-3220, to Mr. ALFREDO L. CACERES at his office, 2395 Ocean Avenue, San Francisco, 415-334-0385, on 2/5/75.

On 3/14/74 IRA YEE advised that on that date, after a meeting with Mr. and Mrs. CACERES regarding the audit of their 1971 U.S. Individual Income Tax Return, Mr. CACERES suggested resolving the tax matter with a "personal settlement", and said he would agree to give $200 to IRS and $500 to Mr. YEE, rather than to agree to the tax deficiency. Mr. CACERES mentioned "personal settlements" several times during the conversation. On 1/27/75 Mr. YEE advised that, after a meeting with Mr. and Mrs. CACERES, on that date, regarding their tax audit, Mr. CACERES again discussed "personal settlements", offered to give Mr. YEE $1000 and the government $1000, rather than to give all of the proposed tax deficiency to the government, and repeatedly asked Mr. YEE to consider the offer. Mr. YEE responded with various replies, including: "I will think about it"; "No"; and "I don't know".

During a meeting between Mr. YEE and Mr. CACERES on 1/31/75 Mr. CACERES gave Mr. YEE $500, promised $500 more at later date, to reduce 1971 1040 tax deficiency to $1000 and to forget business tax issues.

TYPE OF EQUIPMENT TO BE USED

Induction coil
Lanier Cassette Recorder

NAMES OF PERSONS INVOLVED	(1) ROBERT YEE, IRA San Francisco District	(3)
	(2) ALFREDO L. CACERES 2395 Ocean Ave., San Francisco, CA	(4)

PROPOSED LOCATION OF EQUIPMENT

Office of Regional Inspector
160 Pine St., Suite 500, San Francisco, CA

DURATION OF PROPOSED USE

2/5/75

MANNER OR METHOD OF INSTALLATION

Induction coil to be affixed to telephone instrument 415-556-3220 and attached to Lanier recorder.

Attachment(s):	Copies to: RI or DIR (IS) FCB Regional File Case Inspector	No trespass will be involved. APPROVING OFFICIAL'S SIGNATURE ▶

Form 5178 (9-73) Department of the Treasury - Internal Revenue Service

NO. 95/1290
Dept. Exhibit No. 2
Filed DEC 8 - 1975
William L. Whittaker, Clerk
By P. C. Lewis Deputy Clerk

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DEFT. EXHIBIT J

[Feb. 6, 1975]

Assistant Regional Inspector, Internal Security
Inspector W. A. Hill

CACERES, ALFREDO L.
San Francisco, California

7-0374-0220 p/f

At 4:31 p.m., February 5, 1975, Revenue Agent ROBERT YEE initiated a telephone call, from the Office of the Regional Inspector, 160 Pine Street, San Francisco, 415-556-3220, to ALFREDO L. CACERES at Mr. CACERES' office, 2395 Ocean Avenue, San Francisco, 415-335-0385.

During the conversation a meeting between them was scheduled for 3:00 p.m., February 6, 1975, for the purpose of Mr. YEE showing Mr. CACERES an audit agreement. Mr. CACERES advised that he also wanted to discuss an issue of the audit.

The telephone call was monitored and recorded by Inspector M. Stevens, with Mr. YEE's permission. An induction coil and a Lanier cassette recorder, serial number 4104941, was used to record the call. Verbal approval for the use of recording equipment was given by the Assistant Regional Inspector, Internal Security, on February 5, 1975, prior to the initiation of the call.

/s/ W. A. Hill
W. A. HILL

Request for Authorization to Use Electronic Equipment for Consensual Telephone Monitoring	TYPE OF REQUEST ☐ Initial ☒ Extension	REGION Western	DATE 2/13/75
TO Assistant Regional Inspector Internal Security Division	CASE TITLE AND NUMBER ALFREDO L. CACERES 7-0374-0220 2395 Ocean Avenue San Francisco, California		
FROM William A. Hill Inspector	COOPERATING EMPLOYEE'S NAME ROBERT YEE, IRA San Francisco District		
Authorization is hereby requested for the use of electronic equipment in connection with above subject case.	BEGINNING DATE 3/15/74	DATE(S) OF PREVIOUS AUTHORIZATION 25 - 3/15/74-1/30/75, 2/5/75	

REASON FOR SUCH PROPOSED USE

To record a telephone conversation between IRA ROBERT YEE, calling from the Regional Inspector's Office, 415-556-4057, to Mr. ALFREDO L. CACERES at his office, 2395 Ocean Avenue, San Francisco, 415-334-0385, or his residence, 1 Golden Gate Avenue, Belvedere, 415-435-0603, on February 13, 1975.

On 3/14/74 IRA YEE advised that on that date, after a meeting with Mr. and Mrs. CACERES regarding the audit of their 1971 U.S. Individual Income Tax Return, Mr. CACERES suggested resolving the tax matter with a "personal settlement", and said he would agree to give $200 to IRS and $500 to Mr. YEE, rather than to agree to the tax deficiency. Mr. CACERES mentioned "personal settlements" several times during the conversation. On 1/27/75 Mr. YEE advised that, after a meeting with Mr. and Mrs. CACERES, on that date, regarding the tax audit, Mr. CACERES again discussed "personal settlements", offered to give Mr. YEE $1000 and the government $1000, rather than to give all of the proposed tax deficiency to the government, and repeatedly asked Mr. YEE to consider the offer. Mr. YEE responded with various replies, including: "I will think about it"; "No"; and "I don't know".

During a meeting between Mr. YEE and Mr. CACERES on 1/31/75 Mr. CACERES gave Mr. YEE $500, promised $500 more at later date, to reduce 1971 1040 tax deficiency to $1000 and to forget business tax issues. On 2/6/75 Mr. CACERES offered Mr. YEE $2000 more to

(Continued)

TYPE OF EQUIPMENT TO BE USED
Induction coil
Lanier Cassette Recorder

NAMES OF PERSONS INVOLVED	(1) ROBERT YEE, IRA San Francisco District	(3)
	(2) ALFREDO L. CACERES 2395 Ocean Ave., San Francisco, CA	(4)

PROPOSED LOCATION OF EQUIPMENT
Office of Regional Inspector
160 Pine St., Suite 500, San Francisco, CA

DURATION OF PROPOSED USE
30 days commencing 2/11/75

MANNER OR METHOD OF INSTALLATION
Induction coil to be affixed to telephone instrument 415-556-4057 and attached to Lanier recorder.

Attachment(s)	Copies to: RI or DIR (IS) FCB Regional File Case Inspector	*No trespass will be involved.*
		APPROVING OFFICIAL'S SIGNATURE ▶ (Signed) C. ARNOLD DECKER

Form 5173 (9-73) Department of the Treasury - Internal Revenue Service

Deft NO. 75-129
Exhibit No. 4 K
Filed -- DEC 8 - 1975
William L. Whittaker, Clerk
By P.C. Acuna
Deputy Clerk

REASON FOR SUCH PROPOSED USE

audit two additional tax years and on 2/11/75 he paid Mr. YEE another $500.

The Deputy Assistant Attorney General authorized the use of electronic equipment for 30 days commencing 2/11/75. The Assistant Regional Inspector, IS, granted approval for the recording of telephone calls on 2/13/75, prior to the initiation of the calls.

Assistant Regional Inspector, Internal Security

Inspector W. A. Hill

CACERES, ALFREDO L.
San Francisco, California

7-0374-0220 p/f

At 9:43 a.m. and at 9:46 a.m., February 13, 1975, Revenue Agent ROBERT YEE initiated telephone calls, from the Office of the Regional Inspector, 160 Pine Street, San Francisco, 415-556-4057, to ALFREDO L. CACERES' residence, 1 Golden Gate Avenue, Belvedere, 415-435-0603, and to Mr. CACERES' office, 2395 Ocean Avenue, San Francisco, 415-334-0385, respectively. The persons answering the telephone advised that Mr. CACERES was not in.

At 1:47 p.m. Mr. YEE completed a telephone call to Mr. CACERES at his residence, in response to a message left by Mr. CACERES on February 12, 1975. Mr. CACERES said he just wanted to be sure that Mr. YEE's report re his 1973 tax return constituted a complete audit of the return. The call was concluded at 1:51 p.m.

The telephone calls were monitored and recorded by Inspector H. Stevens, with Mr. YEE's permission. An induction coil and a Lanier cassette recorder, serial number 4104941, were used to record the calls. Verbal approval for the use of recording equipment was given by the Assistant Regional Inspector, Internal Security, on February 13, 1975, prior to the initiation of the calls.

/s/ W. A. Hill
W. A. HILL

Via Telephone

REQUEST FOR AUTHORIZATION TO USE ELECTRONIC EQUIPMENT	TYPE OF REQUEST ☐ Initial ☒ Extension	REGION Western	DATE 1/31/75
TO Director Internal Security Division	CASE TITLE AND NUMBER CACERES, Alfredo L. (7-0374-0220) 2395 Ocean Avenue San Francisco, California		
FROM Regional Inspector	COOPERATING EMPLOYEE'S NAME ROBERT KWAN YEE, IRA San Francisco District		
Authorization is hereby requested for the use of electronic equipment in connection with above subject case.	BEGINNING DATE 1/31/75	DATE(S) OF PREVIOUS AUTHORIZATION 3/25/74, 4/24/74, 5/24/74, 6/27/74, 7/23/74, 8/29/74	

REASON FOR SUCH PROPOSED USE

It is proposed to monitor and record a meeting between IRA ROBERT YEE and taxpayer ALFREDO L. CACERES on 1/31/75 at Mr. CACERES' office, 2395 Ocean Avenue, San Francisco, California. The meeting was scheduled at 5:15 p.m., on 1/30/75.

On 3/14/74, IRA completed an affidavit alleging that, on that date, Mr. CACERES offered to pay $500 to him and $200 to the government, as a "personal settlement", to settle the audit of Mr. and Mrs. CACERES' 1971 U.S. Individual Income Tax Return. Mr. YEE ignored Mr. CACERES' offer. In an affidavit dated 1/28/75 Mr. YEE alleged that on 1/27/75 Mr. CACERES again discussed "personal settlements", in regards to the audit of the 1971 tax return, and if the previous offer was too small he was willing to give Mr. YEE $1000 and the government $1000 to settle the audit. Mr. CACERES repeatedly asked Mr. YEE to consider the offer, to which Mr. YEE answered that he would think about it; no, he would not consider it; and he didn't know what he would do about it. During a telephone conversation on 1/29/75 Mr. CACERES made references to their discussion of 1/27/75.

Emergency approval for use of electronic equipment on 1/31/75 was given telephonically by the Director, Internal Security, at 3:15 a.m. PST, on 1/31/75.

TYPE OF EQUIPMENT TO BE USED

Kel or AIJ Transmitter, Nagra self-contained recorder, Tandberg tape recorders, Conco radio receivers.

NAMES OF PERSONS INVOLVED	(1) ROBERT KWAN YEE, IRA San Francisco District	(3)
	(2) ALFREDO L. CACERES 2395 Ocean Avenue, San Francisco	(4)

PROPOSED LOCATION OF EQUIPMENT

At meeting place, Mr. CACERES' office, 2395 Ocean Avenue, San Francisco

DURATION OF PROPOSED USE

30 days commencing 1/31/75

MANNER OR METHOD OF INSTALLATION

To be placed on person of YEE with his permission, and to be monitored and recorded by Inspectors through radio receivers to recorders.

Affidavit, 1/28/75, by YEE	Copies to: DIR (IS) RI Regional File Case Inspector	No trespass will be involved.
		REGIONAL INSPECTOR'S SIGNATURE ▶ (Signed) F. R. Rose

Form 5177 (9-73) Department of the Treasury - Internal Revenue Service

Deft Exhibit No. A
NO. 75-129 L
Filed DEC 8 - 1975
William L. Whittaker, Clerk
By P. C. Grace
Deputy Clerk

AFFIDAVIT

United States of America, Northern)
) ss:
Judicial, District of California)

I, Robert Yee, state that:

I am employed by the IRS as an Internal Revenue Agent at the Oakland, California Post of Duty, 3505 Broadway, Oakland. I attended a meeting at 2172 Market Street, San Francisco, the office of Charles D. Pooley, from 9:30 a.m. to 11:30 a.m. on 1/27/75. The meeting, also attended by Alfredo L. and Doris Caceres and Mr. Pooley, their accountant, was part of my examination of Mr. and Mrs. Caceres' U.S. Individual Income Tax Return for 1971 and Mr. Caceres' business tax returns, Forms 940 and 941, for 1971 and 1972. The purpose of the meeting was for the Caceres' and Mr. Pooley to point out questionable areas in my calculations. Several issues, disclosed by my examination to date, were discussed at the meeting. When Mr. and Mrs. Caceres requested an additional week to check their records I requested that they sign extensions of statutes for the tax returns involved. Mr. Caceres advised that he would have to consult with his attorney before signing the documents and said he would call me later that day to give me his decision. I then left Mr. Pooley's office to return to my car. Mr. Caceres followed me out of the office and started discussing the same tax issues which we had been discussing during the meeting. He said it was too bad we could not settle the matter now and that this was taking a lot of his, his wife's, and the accountant's time. Mr. Caceres asked if I had considered a "personal settlement", and I replied that I had not thought about it. He asked what was necessary to close the audit and I told him that he would have to sign an agreement to my audit findings or sign a statute extension. He asked about my career intentions; asked if I would have lunch with him so we could discuss the audit further, to which I refused; and then began talking about how "settlements" were often made

in business. He said I was doing a good job for the government but was causing an inconvenience to all involved and the matter could be settled without all the trouble. He said that maybe his earlier offer of a "settlement" was too small and that he could give me $1000. He said he had brought $500 which he could give me today and if we could settle for the $1000 he could give me the other $500 later. He asked if I would settle for that and I said I would settle if he would sign the audit agreement or the statute extension. He wanted some clarification regarding the extension and the audit report. I explained the statute extension and told him the audit report would contain my findings to date. regarding his individual tax return. He asked what would then happen to the employment tax issue and I told him I would forward that as being unagreed because he had previously indicated he would not agree to any deficiency in that area. He again asked if I would consider a "settlement" and I told him I would think about it if he would consider signing either the statute extension or the tax deficiency agreement. He repeated that we could save all the hassle if we settled now. He said that the accountant and I were being paid for our efforts, in the audit, but that he and his wife were not. He asked how much it would take to settle the audit issue. He showed me some computations he had made which indicated an approximate tax deficiency of $3200. He said he didn't mind paying his taxes but in view of the trouble it could cause, why not split up the tax adjustment, $1000 to me, $1000 to the government, and the other $1000 to the accountant or himself. He again asked if I would consider such a settlement. I asked him if he would consider my proposal of signing an agreement or the statute extension. He said he would consider it but instead of paying the government money, to use in Cambodia or other places, wouldn't it be better to give it to me? He asked if I could use $1000 and I said I didn't need to answer that. He again asked if I would consider a "settlement" and I said I would if he would consider my proposal for concluding the audit. He again inquired about the employment tax,

we both went back into Mr. Pooley's office, where he obtained a letter of questions I had sent him earlier, and we walked outside and discussed the employment tax further. He again asked if I had considered a "settlement", I replied I had not, and he asked if under no circumstances I would accept a settlement and I said I didn't know. He asked me to consider his offer again. He said I had not made any offers and he wanted me to make a definite statement. I told him I had to have either the statute extension signed or the tax deficiency signed or I would have to submit my audit findings unagreed. I attempted to leave several times but he would continue to discuss the tax issues and ask me to consider his offer of a "settlement". I answered several more times that I would consider his offer and when he became more insistent on a definite answer I said "no". He then asked if I would not consider the "settlement" under any circumstances and I replied that I didn't know. I again told him to consider my proposal and left Mr. Caceres. The time was approximately 1:00 p.m.

I have read the foregoing statement consisting of 3 pages, each of which I have signed. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each.

I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it.

/s/ Robert Yee
ROBERT YEE

Subscribed and sworn to before me this 28th day of January, 1975, at San Francisco California.

/s/ William A. Hill
WILLIAM A. HILL
Inspector
Internal Revenue Service

/s/ Marvin Stevens
MARVIN STEVENS

Office of Assistant Commissioner (Inspection) [1/31/75
Attn: Director, Internal Security Division Faxed to NO]
Office of Regional Inspector, Western Region

[Jan. 31, 1975]

Emergency Approval for Use of Electronic Equipment

Re: CACERES, ALFREDO L.

7-0374-0220 p/f

On January 27, 1975, taxpayer ALFREDO L. CACERES renewed a bribe offer to Internal Revenue Agent ROBERT YEE, which had initially been made on March 14, 1974. As of January 27, 1975, there were no additional meetings scheduled between the taxpayer and Mr. YEE. During subsequent telephone conversations between Mr. CACERES and Mr. YEE, Mr. CACERES indicated that he was not prepared for a meeting with Mr. YEE and as Mr. YEE was intending to close the audit unagreed a meeting between them appeared to be unlikely.

At approximately 5:15 p.m., on January 30, 1975, during a telephone conversation between Mr. YEE and Mr. CACERES, a meeting between them was scheduled for 2:00 p.m. on January 31, 1975. Due to previous conversations between them a meeting at a later date would not be practical or keeping in character with Mr. YEE, possibly defeating the purpose of monitoring the meeting.

The Director, Internal Security, was telephonically advised of the meeting, by the Assistant Regional Inspector, Internal Security, Western Region, at the earliest opportunity, 8:15 a.m., January 31, 1975. The Director approved the use of electronic equipment at that time.

/s/ Barry Cohen
BARRY COHEN
Assistant Regional Inspector
Internal Security

Office of Assistant Commissioner (Inspection)
Attn: Director, Internal Security
Regional Inspector, Western Region

[Feb. 3, 1975]

Use of Electronic Equipment

Re: CACERES, ALFREDO L.
San Francisco, California
Bribery

7-0374-0220 p/f

On January 31, 1975, between 2:15 and 3:45, Internal Revenue Agent ROBERT YEE met with ALFREDO L. CACERES at Mr. CACERES' office, 2395 Ocean Avenue, San Francisco. During the meeting Mr. CACERES offered Mr. YEE $1000 to reduce the tax deficiency, determined by Mr. CACERES to be $3200, for the 1971 U.S. Individual Income Tax Return, to $1000. Upon Mr. YEE's agreement Mr. CACERES gave Mr. YEE $500 and promised to give him an additional $500 when he received a notice from IRS showing the tax deficiency to be approximately $1000. Mr. CACERES also requested Mr. YEE to close the audit of his business taxes unchanged.

Prior to the meeting a Nagra self-contained tape recorder and a Kel radio transmitter were placed on Mr. YEE's person by Inspector M. STEVENS, with Mr. YEE's permission. The meeting with Mr. CACERES was monitored by Inspectors and recorded on a Tandberg tape recorder operated by Inspectors in a car in the immediate vicinity of the meeting place. The tape recorders were activated at 2:03 p.m. and deactivated at 3:51 p.m.

Emergency authorization for the use of electronic recording equipment was granted by the Director, Internal Security, on January 31, 1975 at 8:15 a.m.

/s/ F. R. Rowe
F. R. ROWE
Regional Inspector

DEFT. EXHIBIT M

MEMORANDUM

[February 6, 1975]

to: P/F 7-0374-0220

from: Assistant Regional Inspector (IS)
Western Region

subject: ALFREDO CACERES
7-0374-0220

On February 6, 1975, the Director, Internal Security granted emergency approval for the use of electronic equipment on February 6, 1975 in the case investigation of ALFREDO CACERES. The Director requested that a memorandum of the results of the meeting be faxed to him as soon as possible.

/s/ Barry Cohen
BARRY COHEN
Assistant Regional Inspector (IS)

cc: Case Inspector Hill
RI's file.

Internal Revenue Service

Office of Assistant Commissioner (Inspection) I:IS

ATTN: Director, Internal Security Division

Regional Inspector, Western Region

[Feb. 7, 1975]

Use of Electronic Equipment

Re: CACERES, ALFREDO L.
San Francisco, California
Bribery
7-0374-0220 p/f

On February 6, 1975, between 3:05 p.m. and 4:00 p.m., Revenue Agent ROBERT YEE met with ALFREDO L. CACERES at the Holiday Inn Motel, Pine Street and Van Ness, San Francisco, California. During the meeting, Mr. CACERES repeated the conditions of a bribe offer and payment made on January 31, 1975 and made an additional offer of $2,000 for Mr. YEE to audit his 1973 and 1974 U.S. Individual Income Tax Returns, closing one with no change and the other with a $300 change. Mr. CACERES suggested that they meet again on February 11, 1975, at which time he would give Mr. YEE another $500 and he could sign the agreement for the 1971 tax audit.

Prior to the meeting, a Nagra self-contained tape recorder and a Kel radio transmitter were placed on Mr. YEE's person by Inspector D. NURSE, with Mr. YEE's permission. The meeting with Mr. CACERES was monitored by Inspectors and recorded on a Tandberg tape recorder, operated by Inspectors in a car in the immediate vicinity, and on the Nagra recorder on Mr. YEE's person. The tape recorders were activated at approximately 2:52 p.m. and deactivated at 4:05 p.m.

Emergency authorization for the use of electronic recording equipment was granted by the Director, Internal Security Division on February 6, 1975, prior to the use of such equipment.

It is anticipated that electronic recording equipment will be used to record the meeting scheduled for February 11, 1975.

/s/ F. R. Rowe
F. R. ROWE
Regional Inspector

DEFT. EXHIBIT N

MEMORANDUM

[Feb. 12, 1975]

Faxed to: MR. ROWE

From: N.O.
2/13/75, 8:30 a.m.

To: Regional Inspector, Western Region

From: Office of Assistant Commissioner (Inspection)

Subject: ALFREDO L. CACERES
Taxpayer
Bribery
WR 7-0374-0220

On February 11, 1975, the Criminal Division, Department of Justice, telephonically advised that the Deputy Assistant Attorney General authorized the use of electronic equipment in the captioned case for a period of 30 days beginning February 11, 1975. It is requested that we be notified by memorandum of the results of the electronic coverage within 48 hours after each meeting. If the meeting is cancelled, please submit a memorandum stating the reasons therefore.

/s/ James Chenoweth
JAMES CHENOWETH
Acting Director
Internal Security Division

DEFT. EXHIBIT O

[Feb. 12, 1975]

Office of Assistant Commissioner (Inspection) I:IS:C

Attn: Director, Internal Security Division

Regional Inspector, Western Region

Use of Electronic Equipment

Re: CACERES, ALFREDO L.
San Francisco, California
Bribery

7-0374-0220 p/f

On February 11, 1975, between 2:35 p.m. and 3:16 p.m., Revenue Agent Robert Yee met with ALFREDO L. CACERES at the Holiday Inn, Pine Street and Van Ness, San Francisco, California. During the meeting Mr. CACERES signed a Form 4549, Income Tax Audit Changes, for 1971, 1972, and 1973, with his name and his wife's name. The form was prepared by Mr. Yee to reflect deficiencies as requested by Mr. CACERES during a prior meeting and the 1973 portion was left blank with the understanding Mr. Yee would fill in figures according to their earlier agreement. Mr. CACERES gave Mr. Yee $500 cash as the second payment for the changing of the 1971 audit deficiency and promised him $1000 more when he received notification that the 1973 tax deficiency was assessed as promised by Mr. Yee.

Prior to the meeting, a Nagra self-contained tape recorder and an AID radio transmitter were placed on Mr. Yee's person by Inspector M. Stevens, with Mr. Yee's permission. The meeting with Mr. CACERES was monitored by Inspectors and recorded on two Tandberg tape recorders, one carried by an Inspector in the building and the other operated by Inspectors in a car in the immediate vicinity, and on the Nagra recorder on Mr. Yee's person. The tape recorders were activated at approximately 2:24 p.m. and deactivated at 3:24 p.m.

Authorization for the use of electronic recording equipment was granted by the Attorney General's Office on February 11, 1975, prior to the use of such equipment.

/s/ F. R. Rowe
F. R. ROWE
Regional Inspector

Routing Slip

Internal Revenue Service

To	Symbol	Room	Initial–Date
Inspector W. A. Hill THRU: G/S Goldenberg (SP-5)			

☐ Per our conversation
☐ As requested
☐ Approval
☐ Comments
☒ Information
☐ Corrections

☐ Signature
☐ Initials
☐ Note and return
☐ Necessary action
☐ See me
☐ Call me

☐ File
☐ Prepare reply for signature of _____
☐ Please answer by _____

Remarks

For your information, original of the attached has been inserted into p/f #7-0374-0220.

From ~~(Signed)~~ BARRY COHEN
Barry Cohen
ARI(IS), W/R

Phone

Date 3/3/75

Form 1725 (Rev. 11-72)

Draft NO. 75-129 P
Exhibit No.
Filed DEC 8 1975
William L. Whittaker, Clerk
By P. C. Gieu
Deputy Clerk

INTERNAL REVENUE SERVICE

MEMORANDUM

[Received Mar. 3, 1975]

[Regional Inspector, San Francisco]

date: February 27, 1975

to: Regional Inspector, Western Region

from: Office of Assistant Commissioner (Inspection)
I:IS:C

subject: CACERES, ALFREDO L.
Taxpayer
Bribery
WR #7-0374-0220

Attached for your file is a copy of a memorandum dated February 7, 1975 on which the Deputy Assistant General, Criminal Division, has noted his approval for the use of electronic devices in this case for 30 days beginning February 11, 1975.

/s/ [Illegible]
Senior Coordinator
Field Coordination Branch

Attachment

INTERNAL REVENUE SERVICE

MEMORANDUM [called 2/11]

date: Feb. 7, 1975

to: Assistant Attorney General, Criminal Division
Director, Internal Security Division
for

from: Donald C. Alexander
Commissioner of Internal Revenue

subject: Notification of Emergency Approval of Consenusal Use of Electronic Equipment and Request for Further Use
ALFREDO L. CACERES, Taxpayer; Bribery; WR 7-0374-0220

On the following dates your office granted approval for the consensual use of electronic monitoring equipment in this investigation: March 25, 1974; April 24, 1974; May 24, 1974; June 27, 1974; July 23, 1974; and, August 29, 1974. Internal Revenue Agent ROBERT KWAN YEE has been assigned to audit the 1971 personal income tax return of ALFREDO L. CACERES, 2395 Ocean Avenue, San Francisco, California. On various occasions during the audit CACERES discussed making a "personal settlement" with YEE whereby YEE would get a payoff for reducing the tax owed by CACERES. During a meeting on January 27, 1975, CACERES stated that he was willing to give YEE $1,000 and the government $1,000 to settle the audit. CACERES' actual liability is approximately $3,200. During a telephone conversation on January 29, 1975, CACERES referred to his January 27, 1975, offer to YEE and asked YEE to meet with him on January 31, 1975. Due to the time element involved this office granted emergency approval for the consensual use of electronic monitoring equipment to cover the January 31, 1975, meeting. During the meeting CACERES paid YEE $500 to reduce the $3,200 tax liability to $1,000 and promised to pay another $500 when he received the paper work from IRS

indicating that YEE had kept his part of the bargain. During a subsequent meeting on February 6, 1975, for which this office again granted emergency approval for the consensual use of electronic monitoring equipment, CACERES offered to pay YEE an additional $2,000 if YEE would handle the audit of CACERES' 1972 tax return as no change. The next meeting between CACERES and YEE is scheduled for February 11, 1975. We request authorization for the consensual use of electronic monitoring equipment to cover the February 11, 1975, meeting and any subsequent meetings necessary to conclude this investigation.

/s/ [Illegible]
Director
Internal Security Division

Approved: for 30 days:
(Pursuant to Order No. 566-74)

/s/ Kevin Maroney
KEVIN MARONEY
Deputy Assistant Attorney General

Date: 2/10/75

SUPREME COURT OF THE UNITED STATES

No. 76-1309

UNITED STATES, PETITIONER

v.

ALFREDO L. CACERES

ORDER ALLOWING CERTIORARI

Filed June 5, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 289067 63

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1309

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether the Ninth Circuit was correct in holding that evidence unlawfully seized by Internal Revenue Service agents engaging in conduct substantially violative of their agency's published regulations should be suppressed.

STATUTORY AND OTHER PROVISIONS INVOLVED

In addition to the Internal Revenue Manual provisions set forth in the Government's Petition (hereinafter "G.P.") at pp. 3-4, Paragraphs 9381(3), 9389.1, 9389.7, and 652.1 are also involved in this case. These provisions are set forth in full in Appendix A to Respondent's Opposition.

STATEMENT

Respondent Dr. Alfredo L. Cacerces is charged with violating 18 U.S.C. § 201(b). In August 1975 Dr. Caceres was tried before a jury in the United States District Court for the Northern District of California. He raised defenses of entrapment and diminished mental capacity, offering expert psychiatric testimony on the latter issue. The jury was unable to agree on a verdict, and the Court declared a mistrial. Before his second trial, Dr. Caceres retained new counsel and brought a motion to suppress evidence unlawfully seized by agents of the Internal Revenue Service (hereinafter "IRS"). The District Court found that substantial portions of the evidence in question—recordings of face-to-face conversations during which IRS agents conducted electronic surveillance against Dr. Caceres—were seized in violation of Internal Revenue Service Regulations and must be suppressed.

The electronic surveillance on which respondent's motion was based began in March 1974, during an audit of respondent's individual and employment tax returns. Revenue Agent Robert K. Yee claimed that during March 1974, Dr. Caceres offered him a personal settlement in order to receive a favorable resolution of the audit on the above-mentioned returns. Suppression Hearing Transcript (hereinafter "S. Tr.") 23. On March 21, 1974, IRS personnel electronically monitored and recorded a conversation between Agent Yee and Dr. Caceres without the latter's knowledge. No further investigation of Agent Yee's allegations of bribery occurred for the next ten months. S. Tr. 23-24.

On January 30, 1975, Agent Yee telephoned Dr. Caceres and proposed a meeting for the following day. *See* S. Tr. 15. On February 5, 1975, Agent Yee again called Dr. Caceres

and proposed a meeting for the following day. *See* S. Tr. 17-18. During the two meetings thus arranged by Agent Yee for January 31 and February 6, 1975, IRS personnel conducted the electronic eavesdropping against Dr. Caceres that is the subject of the Government's petition.

Although the Internal Revenue Manual requires prior written authorization for electronic eavesdropping from the Attorney General of the United States or any designated Assistant Attorney General, Internal Revenue Manual ¶ 652.22(1), and the agent in charge, Inspector Hill, was familiar with the procedures, S. Tr. 39-40, it is conceded that the agents did not follow this procedure. Instead, an oral request was made to the Director of the Internal Security Division of the IRS. Despite the ten-month interval between Agent Yee's initial allegation and the electronic eavesdropping at issue here the apparent justification for this procedure was that an emergency existed, and that in such cases the Director of the Internal Security Division is empowered to grant authorization orally. Internal Revenue Manual ¶ 652.22(6).

On the basis of this conversation with the Director, Hill and the others conducted electronic eavesdropping against Dr. Caceres during his conversation with Agent Yee on January 31, 1975. No written request for authorization was drafted until that date. *See* Defendant's Exhibit (hereinafter "D. Exh.") L; S. Tr. 49. On February 7, 1975, one week after the request was telecopied to Washington, the IRS submitted it to the Justice Department for review and approval.[1] D. Exh. P. In the meantime, the agents again conducted electronic eavesdropping against Dr. Caceres on

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1. The Government is incorrect in stating (G.P. 7) that at the time of the electronic eavesdropping on February 6, 1975 a request for authorization was pending. The IRS did not transmit the authorization request to the Justice Department until February 7, 1975. *See* D. Exh. P.

February 6, once again on the authority of a telephone conversation with one of their superiors within the IRS.

After hearing the agents' testimony, the District Court found that there were no exigent circumstances in this investigation, and that "the only 'emergency' was created wholly by the I.R.S." Suppression Order, p. 6.[2] Therefore, the Court concluded, the Government had not justified its failure to follow the standard authorization procedures set forth in the IRS regulations in conducting elecronic eavesdropping during the January 31, 1975 and February 6, 1975 conversations. The Ninth Circuit agreed and affirmed as to these conversations,[3] stating:

> these "exigencies" were entirely government-created. [citations omitted] There is no reason to believe that the requests could not have been made earlier. The investigation had been going on for some ten months, and the appellee was readily available for questioning during that time.

REASONS FOR DENYING THE PETITION

As to the question presented in this case, there is no conflict between the ruling of the Court of Appeals for the Ninth Circuit and the decisions of this Court or of other courts of appeals. Nor is there any conflict with applicable state or territorial law. The decision below did not strike down or invalidate any Act of Congress, state law, or admin-

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2. The Government's statement (G.P. 7) of the reasons for the District Court's finding that there was no emergency is incomplete. The District Court also relied on the fact that the agents involved could offer no explanation for the ten-month hiatus between the agent's original allegation of bribery and the electronic eavesdropping at issue here.

3. The District Court also suppressed recordings made at a later face-to-face meeting and denied respondent's motion to suppress as to several electronically monitored telephone conversations. The Court of Appeals reversed as to the later face-to-face conversation. None of these rulings are at issue on the Government's petition.

istrative regulation. *See* R. Stern & E. Gressman, Supreme Court Practice § 4.12 at 168-69 (4th ed. 1969). The sole basis on which the Government seeks review is its claim that the law on the question presented is unsettled. A review of the pertinent authorities shows that in this case the Ninth Circuit adhered to doctrines consistently applied by this Court and the lower federal courts for several decades. The Government's petition fails to present an important issue not disposed of by these prior decisions and thus offers no basis for an exercise of the Court's certiorari jurisdiction. *See* R. Stern & E. Gressman, *supra*, § 4.11 at 167-68. The petition instead rests largely on the Government's disagreement with what it regards as an erroneous application of well-settled principles in this particular case. If the District Court and the Court of Appeals had so erred in this case, that would not be an appropriate basis for granting the writ. *See* R. Stern & E. Gressman, *supra*, § 4.18 at 178-79. Insofar as the Government's petition seeks an abandonment of established doctrines relating to the suppression of unlawfully seized evidence or the scope of the Due Process Clause, respondent submits that, as demonstrated in his opposition argument, this case is an inappropriate one for such a reconsideration.

1. The Government takes the position that its agents are not required to obey published regulations promulgated by their agency specifically to govern their conduct and to provide protection for citizens under investigation. G.P. 12, 14. The Government's petition is not a request for consideration of a novel question of law, but rather an invitation to the Court to retreat from "a settled rule that has been enforced in a wide variety of contexts." *Checkman v. Laird*, 469 F.2d 773, 780 (2d Cir. 1972): that administrative regulations, no less than statutes or the Constitution itself, have the force and effect of law. *United States v. Nixon*, 418 U.S. 683, 695,

41 L.Ed. 2d 1039 (1974). Agents of the Government must obey the regulations and procedures of a Government agency as long as they remain in effect, even though the agency had no obligation to formulate them and even though they are more generous to the citizen than the requirements of the Constitution or applicable statutes. When the unlawful actions of the Government's agents substantially violate a regulation designed to protect the interests of private citizens, due process of law is denied.

This principle has been applied to overturn the actions of agents of the Government in matters as to which the Government has always been accorded the broadest possible discretion by the courts. The leading case, *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681 (1954) involved a violation of immigration regulations by the Attorney General of the United States. The Court overturned the action of the Attorney General, even though it has always been recognized that the federal government has plenary power over immigration. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 96 L.Ed. 586 (1952); *Jay v. Boyd*, 224 F.2d 957, 968 (9th Cir. 1955). Violation of agency procedures has been the basis for reversing discharge of government employees on grounds of national security. *Vitarelli v. Seaton*, 359 U.S. 535, 3 L.Ed. 2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 1 L.Ed. 2d 1403 (1957). Officials of the legislative branch have been held bound by their own rules. *Yellin v. United States*, 374 U.S. 109, 10 L.Ed. 2d 778 (1963) (overturning conviction of contempt of Congress on the ground that refusal to testify was justified by Congresional Committee's failure to adhere to its own rules on executive sessions). *See generally, United States v. Nixon*, 418 U.S. 683, 694-96, 41 L.Ed. 2d 1039, 1056-57 (1974). Even military regulations "once issued must be followed scrupulously." *Brooks v. Clifford*, 409 F.2d 700, 706 (4th Cir. 1969); *see Sanger v. Seamans*, 507 F.2d 814, 817 (9th Cir. 1974). The

Government has advanced no reason why IRS agents should be immune from the due process restraints imposed on commissioners, cabinet members, and congressmen.

The principle that Government agents must obey their agency's regulations has been applied with particular rigor in accusatorial settings. In *Bridges v. Wixon*, 326 U.S. 135, 150-53, 90 L.Ed. 2103, 2113-15 (1945), the Court considered regulations of the Immigration and Naturalization Service providing detailed procedures for taking statements from witnesses in connection with deportation investigations. Evidence acquired in violation of these procedures was introduced at the deportation hearing. The Supreme Court held that the evidence should have been excluded, stating that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." 326 U.S. at 153, 90 L.Ed. at 2114-15. *See Mah Shee v. White*, 242 F. 868, 871-72 (9th Cir. 1917) (Order refusing entry to alien overturned on the basis of alien's right, implied in Department of Labor regulations, to consult counsel); *Sibray v. United States*, 282 F. 795, 796-98 (3rd Cir. 1922) (Deportation custody held unlawful because of violation of alien's right to inspect warrant of arrest, under regulations of Commisioner General of Immigration.); *Jouras v. Allen*, 222 F. 756, 758 (8th Cir. 1915) (*id.*); *United States v. Dunton*, 288 F. 959, 960 (S.D.N.Y. 1924) (Deportation order overturned where immigration officials failed to observe rule entitling alien to have one friend or relative present at hearing.). *See generally, Bray v. United States*, 515 F.2d 1383, 1393, 1395 (Ct. Cl. 1975) (Involuntary discharge of serviceman voided where witnesses whose testimony was used at discharge proceeding were not made available for cross-examination, as required by Air Force regulations.).

The courts' insistence that Government agents obey the

law has not been confined to overturning agency action. In some instances the more drastic step of overturning a criminal conviction outright has been taken where the conduct exposing the defendant to criminal sanctions was induced by a violation of agency regulations. *See Yellin v. United States, supra,* 374 U.S. 109, 10 L.Ed. 2d 778 (Overturning conviction of contempt of Congress on the ground that refusal to testify was justified by Congressional Committee's failure to adhere to its own regulations on executive sessions.); *United States v. Coleman,* 478 F.2d 1371, 1374 (9th Cir. 1973) (Conviction for refusing induction reversed where Army failed to apply its own standard of fitness for induction.); *United States v. Jones,* 368 F.2d 795 (2d Cir. 1966) (Conviction of narcotics addict for failure to register at border reversed where customs officials failed to observe regulation requiring them to supply registration form.). *See generally, United States v. Smith,* 443 F.2d 1278, 1279-80 (9th Cir. 1971).

The Government's invitation to the Court to narrow the scope of its agents' obligation to obey the published regulations of their agency cannot be taken up without overruling fundamental principles announced by this Court in decisions it has followed for many years.

2. Alternatively the Government argues that, whatever may be the obligations of its agents to observe the requirements of due process by obeying agency regulations in their agency's administrative proceedings, the principle that Government agents must obey such regulations does not apply to the procedural protections at issue here, because they are not trial-type procedures applied in an adjudicative context. G.P. 9, 13. The Government argues that because these procedural regulations apply to the investigative phase of the criminal justice system and could not be relied upon by defendants to their detriment, suppression is

inappropriate. Here, too, the Government is asking the Court to overturn settled principles.

The federal courts have long responded to violations of investigative procedural safeguards by suppressing evidence gathered by means of the offending conduct. *See, e.g., Katz v. United States,* 389 U.S. 347, 19 L.Ed. 2d 576 (1967) (holding that evidence seized during a criminal investigation by means of warrantless, unconstitutional electronic surveillance must be excluded). The Government has cited no authority for the distinction it attempts to make between unconstitutional investigative conduct that denies a citizen's Fourth Amendment rights and unconstitutional conduct that violates the Due Process Clause. *Bridges v. Wixon, supra,* did not involve adjudicative procedures, but rather an agency regulation governing investigative techniques in taking statements from potential witnesses.

Bridges also demonstrates that detrimental reliance by a citizen for whose protection the regulation was promulgated is not the basis of the violation of the Due Process Clause. In that case the petitioner could not have been aware of the unlawful conduct, because it was not even directed at him, but rather at third parties interviewed in connection with the investigation. The Government's attempt to limit the accountability of its agents to situations in which there has been detrimental reliance is especially inappropriate where the unlawful conduct is surreptitious. A citizen can never detrimentally rely upon a procedural safeguard against surreptitious intrusions by agents of the Government, because the very nature of the intrusion is such that he cannot protect against or detect it. His conduct will be the same whether the surreptitious intrusion does or does not occur. Reliance is not the issue. *See generally,* Note, *Violations by Agencies of Their Own Regulations,* 87 Harv. L. Rev. 629, 631-32 (1974). The purpose of such safe-

guards is not to prevent Government agents from tricking the public or inducing detrimental reliance. The purpose is to eliminate the "dirty business" of improper clandestine activity altogether. *See Olmstead v. United States,* 277 U.S. 438, 470, 483-85, 72 L.Ed. 944, 952, 958-59 (1928) (dissenting opinions of Justices Holmes and Brandeis).

3. The Government's second alternative argument is that the obligation of its agents to observe the requirements of due process by obeying agency regulations does not extend to avoiding all infractions, and particularly not to technical violations[4] or transgressions against internal "housekeeping" regulations. Respondent agrees. The lower federal courts have had no difficulty in distinguishing substantial violations from merely technical ones—refusing to permit the former and excusing the latter in a proper case. *Compare United States v. Leahey,* 434 F.2d 7 (1st Cir. 1970); *United States v. Sourapas,* 515 F.2d 295 (9th Cir. 1975); *United States v. Heffner,* 420 F.2d 809 (4th Cir. 1969); *United States v. Wohler,* 382 F. Supp. 229, 233 (D. Utah 1973); *United States v. McDaniels,* 355 F. Supp. 1082, 1085-86 (E.D. La. 1973); *United States v. Maciel,* 351 F. Supp. 817, 819 (D.R.I. 1972); *United States v. Brod,* 324 F.

4. The Government's contention (G.P. 17 n. 15) that the violations here were technical and inadvertent is contradicted by the trial court's finding, which the Ninth Circuit upheld, that the violations here were substantial and unexcused. The Ninth Circuit expressly avoided holding that a mere technical or inadvertent noncompliance would result in suppression. It should also be noted that the Government's presentation of Judge Friendly's view of *Heffner, Leahey,* and *Sourapas* (G.P. 13) is incomplete. In *United States* v. *Leonard,* 524 F.2d 1076, 1089 (2d Cir. 1975) Judge Friendly observed in *dicta* that he was "not at all sure that we would follow the *Heffner-Leahey-Sourapas* doctrine *in the case of an occasional and undeliberate departure* [from agency regulations]." (emphasis added) Notably, no such observations appear in *United States* v. *Gentile,* 525 F.2d 252, 259 (2d Cir. 1975), which, like *Leonard,* held that agency procedures had not been violated and therefore that the suppression issue was not presented.

Supp. 800, 802-03 (S.D. Tex. 1971), *with Johnson v. Chafee,* 469 F.2d 1216, 1218-19 (9th Cir. 1972); *Oshatz v. United States,* 404 F.2d 9, 12 (9th Cir. 1968); *United States v. Morse,* 491 F.2d 149, 156 (1st Cir. 1974); *United States v. Dawson,* 486 F.2d 1326, 1329-30 (5th Cir. 1973); *United States v. Griglio,* 467 F.2d 572, 575-77 (1st Cir. 1972); *United States v. Mathews,* 464 F.2d 1268, 1269-70 (5th Cir. 1972); *United States v. Bembridge,* 458 F.2d 1262, 1264 (1st Cir. 1972); *Ramirez-Rangel v. Butterfield,* 234 F.2d 828, 830 (6th Cir. 1956).[5]

5. The Government also apparently contends (G.P. 15 n. 13) that suppression was inappropriate because the agents' violation of agency procedures was harmless: that the Justice Department's approval of the IRS' eventual application for authorization shows the earlier surreptitious activity would have been authorized as well if an application had been submitted. This conjecture on a factual question is an inappropriate basis on which to seek a writ of certiorari. *See* R. Stern & E. Gressman, *supra,* § 4.14 at 172. Moreover, the strength of the IRS' application for authorization must be evaluated in light of its false declaration that Dr. Caceres, rather than Agent Yee, was the instigator of the meetings in question. *See* D. Exh. P. In light of the ten-month hiatus in the IRS' investigation, the Justice Department might well have concluded that electronic surveillance would not be appropriate in a case where the investigative agent was taking the initiative in setting up the purported bribery rendezvous. Material misstatements in an application for authority to conduct searches and seizures cannot be considered in determining whether there was a sufficient factual basis for the authorization. *See, e.g., United States v. Hunt,* 496 F.2d 888, 894 (5th Cir. 1974); *United States v. Jones,* 475 F.2d 723, 726 (5th Cir. 1973). In any event, an unwarranted intrusion cannot be justified on the basis of the favorable results it yields for the offending investigative agents. *See, e.g., Whitely v. Warden,* 401 U.S. 560, 567 n. 11, 28 L.Ed. 2d 306 (1971); *Bumper v. North Carolina,* 391 U.S. 543, 548 n. 10, 20 L.Ed. 2d 797 (1968).

The Government's contention (G.P. 17 n. 15) that the IRS was not guilty of bad faith is another instance of a factual disagreement with the trial court's findings. The violation of IRS procedures was clear and substantial. At no point has the IRS made any effort to explain the ten-month hiatus in its bribery investigation. The testimony taken by the trial court shows that the agents had no regard for the regulations at all, and conducted their electronic eavesdropping according to the convenience and scheduling desires of the personnel involved. S. Tr. 22.

The courts have also had no difficulty in distinguishing between regulations designed to protect important personal interests, such as privacy, and regulations merely designed to improve an agency's "housekeeping." *Compare United States v. Heffner, supra; United States v. Leahey, supra; United States v. Sourapas, supra; Morton v. Ruiz,* 415 U.S. 199, 235, 39 L.Ed. 2d 270, 294 (1974) (Right to benefits under Indian assistance program.); *Bridges v. Wixon, supra,* 326 U.S. at 152-54, 90 L.Ed. at 2114-15; *United States v. Coleman, supra,* 478 F.2d at 1274 (Right to exemption under draft regulations.), *with Lyman v. United States,* 500 F.2d 1394, 1396 (Temp. Emerg. Ct. App. 1974); *United States v. Bunch,* 399 F. Supp. 1156, 1162 n. 5 (D. Md. 1975); *Teslaar v. Bender,* 365 F. Supp. 1007, 1010 (D. Md. 1973). *See generally, American Farm Lines v. Black Ball Freight,* 379 U.S. 532, 538-39, 25 L.Ed. 2d 547, 553 (1970).

The best illustration of the contrast is provided by a case in which a defendant sought exclusion of statements made to an IRS Revenue Agent at a point in an investigation when, under the agency's regulations, the case should have been referred to a Special Agent in the Intelligence Division. The disputed provision was Section 10.09 of the Internal Revenue Service Audit Technique Handbook, which requires referral of investigations to the Intelligence Division upon discovery of evidence of fraud "to evaluate the criminal potential of the case and decide whether or not a joint investigation should be undertaken." The purpose of the regulation is to ensure expert input on potential criminal cases, rather than to protect individual rights. Therefore, the court refused to suppress the evidence. *United States v. Lockyer,* 448 F.2d 417, 419-22 (10th Cir. 1971); *United States v. Goldstein,* 342 F. Supp. 661, 668 (E.D.N.Y. 1972). *See generally, Rosenberg v. C.I.R.,* 450 F.2d 529, 532-33 (10th Cir. 1971).

Contrary to the Government's contention (G.P. 14) the regulations at issue in this case, like those in *Heffner, Leahey,* and *Sourapas,* are in no sense "internal" and plainly are not mere housekeeping rules designed to improve agency efficiency. They are a formal part of the IRS' operating procedures, published by the IRS and reprinted by commercial services throughout the United States. *See generally, United States v. Heffner, supra,* 420 F.2d at 812, *and cases cited therein.* These procedures plainly were adopted to place limits upon the sweeping powers conferred on Government agents charged with collection of the revenue. They were intended to protect taxpayers, like Dr. Caceres, whom the IRS has under investigation or suspicion.[6] Paragraph 652.1 of the Internal Revenue Manual so provides:

> The highest level of integrity and ethics will be observed in the granting of approval for the use, and the actual use, of any technical investigative equipment. The Service policy to fully respect and observe the Constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced.[7]

These regulations, which spell out explicit, detailed, mandatory procedures, are easily distinguishable from merely

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6. The Government has tacitly admitted this in arguing (G.P. 19) that the suppression of evidence seized in violation of regulations like those in this case will discourage agencies from adopting procedures to protect important individual interests.

7. *See also* Internal Revenue Manual ¶ 9389.1(5), declaring that electronic eavesdropping "must be sparingly and carefully used" and "is subject to careful regulation in order to avoid any abuse or unwarranted invasion of privacy."; Internal Revenue Manual ¶ 9389.7.

directory declarations of an agency's policies and goals.[8] *Cf. United States v. Walden,* 490 F.2d 372, 376-77 (4th Cir. 1974) (Navy regulation in question merely stated that civilian personnel were to be used "to the maximum extent possible" in preserving law and order—rather than employing Navy personnel); *United States v. Reeb,* 433 F.2d 381, 384 (9th Cir. 1970); *Smith v. United States,* 478 F.2d 398, 400 (5th Cir. 1973); *Rosenberg v. C.I.R., supra,* 450 F.2d at 532-33. Thus on this point, as on the others discussed above, the Ninth Circuit has carefully observed the settled principles and distinctions spelled out in prior law.

4. The Government notes that the federal courts' supervisory power is an alternative basis for the decision below, in addition to the due process principles on which the Ninth Circuit relied. G.P. 10-11. The exclusionary rule has always been applied not only as a constitutional principle but also as an instrument of the "supervisory power over the administration of justice in the federal courts." *Elkins v. United States,* 364 U.S. 206, 216, 4 L.Ed. 2d 1669, 1677 (1960); *see Rea v. United States,* 350 U.S. 214, 217, 100 L.Ed. 233, 236 (1956); *McNabb v. United States,* 318 U.S. 332, 341, 87 L.Ed. 819, 824 (1943). It has consistently been held that the Courts of Appeals have inherent supervisory powers. *See Cupp v. Naughten,* 414 U.S. 141, 146, 38 L.Ed. 2d 368, 372-73 (1973); *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259-60,

8. *United States v. Kline,* 366 F. Supp. 994, 997 (D.D.C. 1973), cited by the Government, dealt with an unpublished Justice Department memorandum on guidelines for electronic eavesdropping, not agency-adopted procedures published in the very manual agents use in conducting investigations. *Sullivan v. United States,* 348 U.S. 170, 99 L.Ed. 210 (1954), also cited by the Government, dealt with a regulation requiring approval from the office of the Attorney General before evidence could be presented to a grand jury by a United States Attorney in a prosecution for violation of internal revenue laws. The purpose of the regulation was to centralize control over such cases in the Justice Department, not to protect important individual interests.

1 L.Ed. 2d 290, 298-99 (1957). The Courts of Appeals have repeatedly exercised these powers in criminal cases. *See Burton v. United States,* 483 F.2d 1182 (9th Cir. 1973) *and cases cited therein.* The federal courts have an "inherent power to refuse to receive material evidence" in a proper case. *Lopez v. United States,* 373 U.S. 427, 440, 10 L.Ed. 2d 462, 471 (1963).

The Government asserts, on the basis of *Lopez,* that an exercise of supervisory powers is inappropriate unless the Government agents engaged in "manifestly improper conduct." The findings of the District Court in this case satisfy that standard. In *Lopez* this Court specified the kind of conduct that would lead to suppression: in addition to unconstitutional conduct, actions "violating some statute *or rule of procedure,*" the Court said, would warrant exclusion of the improperly seized evidence. 373 U.S. at 440 (emphasis added).[9]

5. The Government's petition seeks not only a curtailment of the obligation of its agents to refrain from unlawful conduct in the course of their investigations, but also a

9. The Government's invocation of 18 U.S.C. § 3501 and Rule 402 of the Federal Rules of Evidence apparently is intended to show that the exercise of supervisory power in this case is contrary to the expressed will of Congress. Section 3501, however, confers no special evidentiary dignity upon confessions or other purportedly inculpatory statements. Its purpose is to make voluntariness the test of admissibility of confessions, so as to avoid exclusion of such statements solely on the basis of delay in arraignment. *See United States v. Holbert,* 436 F.2d 1226, 1231-34 (9th Cir. 1970); 1968 U.S. Code Cong. & Ad. News 2112, 2124-2125. Rule 402 merely restates the familiar principle that relevant evidence not otherwise improper is admissible. As the Second Circuit noted in *United States v. Jacobs,* 547 F.2d 772, 777 (2d Cir. 1976), the Government has cited no authority for its extreme interpretation of Rule 402, and specifically no authority for the idea that Congress, in enacting the rule, "was concerning itself with the supervisory powers of the federal courts." The rule in no way affects the inherent supervisory powers of the federal courts.

reconsideration of the deterrence rationale underlying suppression of the fruits of such conduct. The Government argues that the deterrent effect of suppression is not great where the unlawful conduct involves administrative regulations, and that the effect of suppression will be to discourage promulgation of salutary procedural safeguards like those at issue here. G.P. 17-19.

Respondent submits that the deterrent effect of suppression is greatest in the case of administrative regulations. Where an agency has promulgated procedures to be applied in the context of investigative problems peculiar to its own mission, its officials can be expected to know and understand those procedures. In the present case, the regulations are part of a set of procedures that IRS agents deal with regularly and are directed to learn and follow. Internal Revenue Manual ¶ 9381(3)(e), (f).[10] It may well be a fair complaint that agents of the Government cannot effectively be deterred from running afoul of abstruse constitutional requirements difficult for judges themselves to understand. *See, e.g., Spinnelli v. United States,* 393 U.S. 410, 438, 21 L.Ed. 2d 637 (1969). The deterrent effect of suppression may also be questionable when the rule is applied in post-conviction proceedings, *Stone v. Powell,* 96 S. Ct. 3037, 49 L.Ed. 2d 1067 (1976), or to the conduct of persons other than law enforcement officials. *Cf. United States v. Karathanos,* 531 F.2d 26 (2d Cir. 1976). These complaints have no relevance, however, where suppression is ordered on

10. The Government's suggestion (G.P. 18 n. 17) that the IRS' own disciplinary procedures can be relied upon to curb illegal conduct by investigative agents is another assault on settled principles. Even the availability of criminal sanctions does not supplant the need for suppression of unlawfully seized evidence. *Lee v. Florida,* 392 U.S. 378, 386-87, 20 L.Ed. 2d 1166, 1172-73 (1967); *see United States v. Leahey, supra,* 434 F.2d at 10.

the basis of procedures that are clearly spelled out in the very manual the agents are to use as a day-to-day guide in conducting investigations.

It is doubtful that suppression of unlawfully seized evidence will discourage the adoption of procedural safeguards by federal agencies. The warning requirements in *Heffner, Leahey* and *Sourapas* were adopted in 1967. In the eight years since the first of these decisions, those requirements have remained in full force and effect. As the Government points out (G.P. 6 n. 4), the regulations at issue here were drafted to conform to standards circulated by the Justice Department in 1972—three years after *Heffner* and two years after *Leahey.*

Thus, even if the Court were to conclude that the present scope of the exclusionary rule should be narrowed to be more consistent with the underlying deterrence rationale, the present case would be an inappropriate means to do so. Where a deprivation of constitutional rights results from unlawful conduct in violation of an agency regulation, the deterrent effect of the exclusionary rule is at its strongest, not at its weakest.

CONCLUSION

In this case the Ninth Circuit held that when agents of the federal government engage in conduct that denies a citizen due process by substantially violating published procedures of their own agency designed to protect fundamental personal interests of private citizens, evidence seized in the course of the unlawful conduct must be suppressed. This decision is an application of a very broad and fundamental principle in our system of law, and is harmonious with the many decisions of this Court and the lower federal courts invoking the principle in a wide

variety of contexts. That principle is that even the Government's own agents must respect the law—even a law that their agency could amend or repeal if it so desired. The Government has offered no cogent reason why this principle should be disturbed or reconsidered. Therefore the petition for certiorari should be denied.

JAMES J. BROSNAHAN
H. PRESTON MOORE, JR.
MORRISON & FOERSTER

Appendix A

Internal Revenue Service Regulations

652.1

Authority

(1) The procedures established concerning the interception, overhearing, transmitting or recording of telephone or non-telephone conversations, with the consent of one or all of the parties, are set forth herein in accordance with IRS policy statement P-9-35; and in accordance with the Department of Justice Guidelines on "Monitoring Private Conversations With the Consent of a Party," dated October 16, 1972.

(2) Approval of requests for permission to use electronic equipment will normally be extended only in cases involving known or suspected violations of those sections in Titles 18 and 26, USC, which come under the jurisdiction of Inspection.

(3) The highest level of integrity and ethics will be observed in the granting of approval for the use, and in actual use, of any technical investigative equipment. The Service policy to fully respect and observe the Constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced. *Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service.*

(4) Violations of the procedures outlined in this subsection may put Inspection personnel beyond that protection from State sanctions afforded to Federal officials who act within the scope of their employment.

(5) Monitoring of private conversation will be authorized only when, in the considered judgment of the designated official, such action is warranted and necessary to effective law enforcement.

9381 (3) (e), (f)

• • •

(3) *Investigative Techniques*—Familiarity with the following investigative techniques used in Intelligence investigations is important:

• • •

(e) methods of employing mechanical aids, such as cameras, photostating equipment, and authorized recording and listening devices;

(f) methods of conducting searches, seizures, and arrests; . . . .

9389.1

General Instructions

(1) This subsection provides Service policy (P-9-35) and procedural instructions on:

(a) the investigative use of electronic or mechanical monitoring devices with the consent of one or more parties to telephone or non-telephone conversations; and

(b) other prohibited and permissible uses of investigative devices.

(2) Under no circumstances will any investigative device be used illegally.

(3) Electronic or mechanical devices may be used to overhear or record non-telephone conversations with express advance consent of all parties to the conversation. Supervisor approval is not required for such use.

(4) The term "Consensual Monitoring" as used herein, means the investigative interception, overhearing, or recording of a private conversation by the use of mechanical, electronic or other devices, with the consent of at least one, but not all the participants, as contrasted to "Non-Consensual Monitoring," where no participant consents.

(5) The monitoring of conversations with the consent of one of the participants is an effective and reliable investigative technique but must be sparingly and carefully used. The Department of Justice has encouraged its use by criminal investigators where it is both appropriate and necessary to establish a criminal offense. While such monitoring is constitutionally and statutorily permissible, this investigative technique is subject to careful regulation in order to avoid any abuse or any unwarranted invasion of privacy.

9389.7

Adherence to Service Policy

The Service policy to fully respect and observe the constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced. Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service. Violations of the procedures outlined above may put Service personnel beyond that protection for State sanctions afforded to Federal officials who act within the scope of their employment. In cases where there is any question concerning the legality or prohibition of the use of investigative equipment, the question will be referred through appropriate channels to the Office of the Chief Counsel. Whenever necessary, Chief Counsel will refer the question to the Department of Justice. Their determination will be controlling on Service personnel.

No. 76-1309

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 545 F. 2d 1182. The opinion of the district court (Pet. App. 15a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1976, and a petition for rehearing was denied on January 20, 1977 (Pet. App. 13a-14a).

On February 10, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 21, 1977. The petition was filed on that date and was granted on June 5, 1978 (A. 80). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is proper for a court to suppress otherwise admissible and probative evidence in a criminal case solely because the government failed to comply fully with an internal regulation that imposes procedures not required by the Constitution or by statute.

STATUTORY AND OTHER PROVISIONS INVOLVED

1. 18 U.S.C. 3501 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. * * *
>
> * * * * *
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

2. Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

3. The Attorney General's October 16, 1972, Memorandum to the Heads of Executive Departments and Agencies, "Monitoring Private Conversations with the Consent of a Party," is reproduced in the Appendix, *infra.*

4. Paragraph 652.1 of the Internal Revenue Service Manual (in effect January 1975) provides in pertinent part:

> Authority
>
> (1) The procedures established concerning the interception, overhearing, transmitting or recording of telephone or non-telephone conversations, with the consent of one or all of the parties, are set forth herein in accordance with IRS policy statement P-9-35; and in accordance with the Department of Justice Guidelines on "Monitoring Private Conversations With the Consent of a Party," dated October 16, 1972.
>
> * * * * *
>
> (3) The highest level of integrity and ethics will be observed in the granting of approval for the use, and in actual use, of any technical investigative equipment. The Service policy to fully respect and observe the Constitutional and other rights of all persons and to prohibit the improper use of surreptitious listening devices will be strictly enforced. *Any employee who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disci-*

plinary action and may be removed from the Service [emphasis in original].

Paragraph 652.22 of the Internal Revenue Service Manual (in effect January 1975) provides in pertinent part:

> (1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division, cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.
>
> (2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical, electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. * * * Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use.
>
> (3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of person involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] * * *.
>
> * * * * *
>
> (6) When emergency situations occur, the Director, or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelgated. * * * Emergency authorizations pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.
>
> (7) If, at the time the emergency approval request is submitted, it is desired that approval for use of electronic equipment be given for an extended period, this should be indicated on the [appropriate form]. The Director, in addition to reporting his authorization for emergency use to the Attorney General, will also request approval for the Use of Electronic Equipment for the duration of that period specified by the requestor.

STATEMENT

1. In March 1974, during an audit by the Internal Revenue Service ("IRS") of respondent's individual and employment tax returns, respondent proposed a "personal settlement" with Internal Revenue Agent Robert K. Yee (A. 12, 20, 25-26, 46). Agent Yee immediately reported this offer to the Internal Security Division of the IRS (A. 20, 23). During the next several months, Agent Yee confined his investi-

gation to conversations with respondent's wife, who kept the books for his dental practice, and with respondent's accountant (A. 21-22). The agent again contacted respondent on January 27, 1975, at which time respondent renewed the bribe offer. Instead of the approximately $3,200 that respondent estimated he owed in taxes, he proposed paying $1,000 to the government, giving $1,000 to Agent Yee, and keeping the balance for his accountant or himself (A. 34, 66).

At the direction of Inspector William A. Hill of the Internal Security Division, Agent Yee telephoned respondent on January 30, 1975, and arranged a meeting for the next day at respondent's office (A. 14-15). During this meeting, respondent gave Agent Yee $500 in partial payment for settling the tax investigation as respondent had suggested (A. 34, 69). Unbeknownst to respondent, the conversation was monitored by Inspector Hill and recorded by Agent Yee by means of a tape recorder and electronic transmitting device concealed on the agent's person (Pet. App. 2a-3a; A. 14, 34, 69).

Agent Yee telephoned respondent on February 5, 1975, again at Inspector Hill's direction, and scheduled a meeting for the following afternoon to show respondent an agreement form containing the agent's proposed calculations of respondent's tax liability (A. 16, 30, 59). That meeting—at which respondent offered Agent Yee an additional $2,000 to audit his 1973 and 1974 individual income tax returns to respondent's satisfaction (A. 37, 71)—was also monitored and recorded by the agent without respondent's knowledge (Pet. App. 3a-4a).

A third meeting took place on February 11, 1975. It, too, was secretly monitored and recorded by the agent, acting with Inspector Hill's assistance. At this meeting respondent gave Agent Yee $500 as the second installment for the favorable termination of the audit (Pet. App. 4a; A. 39, 74).

On February 26, 1975, respondent was indicted in the United States District Court for the Northern District of California on three counts of bribing a federal official, in violation of 18 U.S.C. 201(b) (Pet. App. 1a; A. 3-4).

2. Prior to trial,[1] respondent moved to suppress the recordings of his meetings with Agent Yee[2] on the

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[1] Respondent's first trial ended in a mistrial when the jury was unable to reach a verdict. The motion to suppress was filed before the second trial began. On July 19, 1978, respondent was indicted on charges of obstruction of justice and subornation of perjury (18 U.S.C. 1503 and 1622) in connection with his first trial.

[2] The telephone conversation between Agent Yee and respondent on January 30, 1975, as well as telephone conversations on January 28 and 29 and February 5 and 13, 1975, were electronically monitored and recorded with Agent Yee's consent. The IRS regulations provide that either the Assistant Regional Inspector (Internal Security) or the Chief of the National Office Investigations Branch (Internal Security) must give advance approval, orally or in writing, to consensual monitoring of telephone conversations. Internal Revenue Service Manual ¶ 652.21(1)-(5). The district court found (Pet. App. 17a) that the recordings of respondent's telephone calls with Agent Yee were made in substantial compliance with these regulations and accordingly denied respondent's motion to suppress them. The admissibility of these recordings is not at issue here.

ground that they had not been properly authorized under applicable IRS internal regulations governing consensual monitoring of face-to-face conversations between agents and taxpayers. Those regulations require that, except in "exigent circumstances," advance authorization for such monitoring be obtained by designated IRS officials from the Department of Justice (IRS Manual ¶ 652.22(1)). "Exigent circumstances" are not defined, but the regulations provide that emergency authorization within the IRS alone "will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General" (IRS Manual ¶ 652.22(6)).

On either January 30 or 31, 1975, shortly after the January 31 meeting in respondent's office had been arranged, Inspector Hill had applied in writing for authorization to monitor conversations between respondent and Agent Yee for a period of 30 days, beginning January 31, 1975 (A. 34, 36, 63-67). This request was transmitted to the IRS National Office in Washington, D.C., on January 31, 1975 (A. 34, 37, 68), but it apparently was not forwarded to the Department of Justice for final approval until February 7, 1975 (A. 39-40, 78). As a result of this delay, the monitoring of the January 31 meeting was given "emergency approval," pursuant to ¶ 652.22(6), by the Director of the IRS Internal Security Division (A. 34, 41, 68). Moreover, since Inspector Hill's request for authorization to monitor had not been acted upon by the time of the February 6 meeting, approval to record that meeting was again given on an emergency basis by the Director of the Internal Security Division (A. 34, 37, 42, 70-72). The monitoring of the February 11, 1975, meeting, however, was authorized by the Justice Department as well as by the appropriate IRS personnel (A. 39-40, 42, 73-75, 77-79).

3. The district court suppressed all three recordings (Pet. App. C). It reasoned that since Agent Yee alone had been responsible for selecting the date of the first two meetings with respondent, no *bona fide* emergency existed to justify the failure to get advance approval from the Department of Justice for the monitoring of those meetings (*id.* at 19a-20a). The district court also found (*id.* at 18a) that the February 11 monitoring violated the IRS regulations because it had been authorized by a Deputy Assistant Attorney General rather than by the Attorney General or an Assistant Attorney General.

The court of appeals reversed that part of the district court's order suppressing the February 11 recording, holding that the authorization by a Deputy Assistant Attorney General was not inconsistent with the IRS regulations (Pet. App. 4a-8a). It agreed with the district court, however, that the "emergencies" of January 31 and February 6 had been government-created and hence did not excuse the IRS's failure to follow its "self-imposed requirement of obtaining advance authorization from the Justice Department" (*id.* at 8a). It therefore affirmed the suppression of the recordings made of those meetings (*id.* at 8a-9a).

In reaching this result, the court acknowledged (Pet. App. 10a; citation and footnote omitted) that "[d]uring 'a period of increasing disenchantment with the exclusionary rule,' * * * the suppression of evidence because of non-compliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach." Nevertheless, it felt bound—"[a]bsent a contrary ruling by the Supreme Court or by this court en banc"—by the decision of another panel of the Ninth Circuit in *United States* v. *Sourapas*, 515 F. 2d 295, suppressing evidence obtained by an IRS agent who had questioned a potential criminal defendant without first giving *Miranda*-type warnings, as required by IRS regulations even for non-custodial interrogation. Moreover, although the court below conceded that not every agency failure to adhere to its internal procedures would amount to a deprivation of due process, it concluded that the noncompliance here "harmed more than just the 'efficiency of the I.R.S. operations'" (*id.* at 11a) and that suppression was therefore warranted.

SUMMARY OF ARGUMENT

Agent Yee consented to the recording of his conversations with respondent on January 31 and February 6, 1975, and the monitoring therefore did not violate the Fourth Amendment or any federal statute. The court of appeals suppressed the recordings solely because the Internal Revenue Service had failed to comply fully with its internal operating procedures

requiring approval from specified officials in the Department of Justice in advance of consensual electronic surveillance of face-to-face discussions between agents and taxpayers. A violation of agency regulations such as these, however, does not justify the suppression of otherwise admissible and probative evidence in a criminal case.

I. The failure of Agent Yee and Inspector Hill to follow the procedures outlined in the IRS Manual did not deprive respondent of due process, which has been defined to encompass the "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112, and that reflect "the community's sense of fair play and decency." *Rochin* v. *California*, 342 U.S. 165, 173. Contrary to the court of appeals' apparent assumption, the Due Process Clause does not require immaculate agency adherence to its own regulations. The cases most often cited for the contrary proposition, *Accardi* v. *Shaughnessy*, 347 U.S. 260, and *Service* v. *Dulles*, 354 U.S. 363, merely "enunciate principles of federal administrative law rather than of constitutional law * * *." *Board of Curators* v. *Horowitz*, No. 76-695, decided March 1, 1978, slip op. 14 n. 8.

Hence, any conclusion that the conduct of the IRS agents—which occurred in an investigative rather than an administrative setting—violated respondent's due process rights must be based on more than their failure to satisfy the IRS rules. There must also be a showing that their oversight operated to treat re-

spondent unfairly, for "[t]he limitations of the Due Process Clause * * * come into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (plurality opinion; emphasis in original).

A. There is no conceivable basis in the present case on which to predicate a violation of respondent's due process rights. There is no evidence that the regulations at issue here, particularly IRS Manual ¶ 652.22, were intended to grant citizens protection against consensual electronic eavesdropping beyond those already provided by the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, much less to allow those additional protections to be enforceable in court over the agency's objection. To the contrary, the procedures were designed primarily to permit responsible government officials to control the actions of their subordinates in an area of some sensitivity, so that out of the broad class of investigations in which conversations between suspects and agents might be recorded without constitutional or statutory restraints, electronic surveillance would be limited to those important criminal investigations in which the technique would be a particularly valuable law enforcement tool. Since the IRS regulations were not by their nature necessarily intended for the benefit of respondent and similarly situated persons, they stand in marked contrast to the regulations in *Accardi*, *Service*, and every other case in which this Court has required an agency to comply with its own rules.

B. Although the Due Process Clause prohibits the government from obtaining an unfair advantage over persons who have reasonably relied on official pronouncements intended to guide their actions, respondent could not possibly have made his incriminating statements to Agent Yee in reliance upon the IRS regulations. Respondent did not know that his conversations were being recorded. *A fortiori*, he did not know that they were being recorded without Justice Department approval. His behavior would not have differed in any respect if the agents had actually obtained monitoring authority pursuant to IRS Manual ¶ 652.22(1), as the court of appeals insisted they should have done, instead of proceeding on the basis of emergency authorizations given by IRS personnel under ¶ 652.22(6).

C. All else aside, it makes little sense to conclude that the conduct of the IRS agents deprived respondent of due process, because the failure to comply with the regulations was plainly immaterial. The Justice Department's approval of the monitoring of the February 11 conversation conclusively demonstrates that Department officials charged with the government's criminal enforcement effort considered this to be a case appropriate for consensual electronic surveillance and that they would have authorized the recording of the January 31 and February 6 conversations if their consent had been sought in advance of those meetings.

D. Because the IRS regulations were not adopted for respondent's benefit, because his incriminating statements could not have been made in reliance upon

the regulations, and because the recording of the conversations would have been approved by Department of Justice officials if the proper procedures had been scrupulously observed, respondent cannot offer a plausible showing of prejudice as a result of the violation of the IRS regulations. But even if he could, this case nonetheless would not present a legitimate occasion for application of the drastic remedy of the exclusionary rule. The suppression remedy, this Court has said time and again, is not "a personal constitutional right of the party aggrieved" (*United States* v. *Calandra*, 414 U.S. 338, 348), and "if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice" (*Stone* v. *Powell*, 428 U.S. 465, 491). Hence, even in the face of the Fourth Amendment violations, "the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348.

Whatever the proper role of the exclusionary rule upon proof of repeated and deliberate violations of agency regulations, its application is wholly inappropriate here, where the noncompliance was isolated and accidental. The deterrent effect of suppression in such circumstances is negligible, and, indeed, imposition of the harsh sanction of exclusion of relevant evidence might have the effect of discouraging agencies from adopting beneficial rules circumscribing the discretion of their employees.

II. The court of appeals also was powerless to order suppression under its "supervisory" powers.

Although the source and proper scope of those powers is uncertain, this Court has articulated two important restrictions on their exercise. First, the judicial supervisory power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. Second, even when not precluded by an Act of Congress, the courts' use of supervisory powers to exclude material evidence must be "sparingly exercised," and then only when justified by "overriding considerations" (*Lopez* v. *United States*, 373 U.S. 427, 440).

Two acts of Congress—Rule 402 of the Federal Rules of Evidence and 18 U.S.C. 3501—barred the court's exercise of its supervisory powers to suppress evidence of respondent's relevant and voluntary self-incriminating statements to Agent Yee. Beyond that, suppression would also be inappropriate here as a means of supervision, because there was no "manifestly improper conduct by federal officials." *Lopez* v. *United States*, *supra*, 373 U.S. at 440.

ARGUMENT

THE FAILURE OF AN EXECUTIVE AGENCY TO COMPLY WITH INTERNAL REGULATIONS THAT ARE NOT REQUIRED BY THE CONSTITUTION OR BY STATUTE DOES NOT JUSTIFY THE SUPPRESSION OF OTHERWISE ADMISSIBLE AND PROBATIVE EVIDENCE IN A CRIMINAL CASE

It is undisputed that the surreptitious monitoring and recording of the conversations between Agent Yee and respondent, all of which occurred with Agent

Yee's consent, violated neither the Constitution (see *United States* v. *White*, 401 U.S. 745, 752 (plurality opinion); *Lopez* v. *United States*, 373 U.S. 427, 437-439) nor federal statutes (see 18 U.S.C. 2511(2)(c)).[3] The court of appeals' suppression of these recordings in respondent's bribery prosecution was therefore premised solely upon the determination that the Internal Revenue Service had neglected to follow its internal operating procedures requiring approval from specified officials in the Department of Justice prior to consensual electronic recording of face-to-face encounters with taxpayers (Pet. App. 8a-9a).[4]

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[3] See, *e.g.*, *United States* v. *Hall*, 536 F. 2d 313, 327 (C.A. 10), certiorari denied, 429 U.S. 919; *United States* v. *Ransom*, 515 F. 2d 885, 890 (C.A. 5), certiorari denied, 424 U.S. 944; *United States* v. *Armocida*, 515 F. 2d 49, 52 (C.A. 3), certiorari denied, 423 U.S. 858.

[4] Although the correctness of the Ninth Circuit's holding that the IRS regulations were violated is not presented here, we note that that conclusion is far from apparent. As discussed above (see p. 8, *supra*), the Attorney General's Memorandum provides that, except in "exigent circumstances," all federal agencies must obtain advance authorization from the Department of Justice before recording any nontelephonic conversation. In the event that an authorization request cannot be submitted to the Justice Department at least 48 hours in advance of the time of the intended recording, subordinate officials designated by the agency head may approve the monitoring on an emergency basis. The IRS Manual implements this memorandum by authorizing the Director of the Internal Security Division or the Assistant Commissioner (Inspection) to grant approval for monitoring that is to take place less than 48 hours from the time of request. The record shows that Inspector Hill sought approval for the surveillance on January 30 or 31, prior to the initial recording, and that, a response not having been received, the appropriate IRS officials granted emergency authorization to monitor and record the January 31 and February 6 meetings.

The opinion of the court of appeals is less clear, however, in articulating the basis upon which it rested its remedy for the violation—*i.e.*, whether it believed suppression was appropriate because the governmental conduct in this case offended due process, or whether it acted in the exercise of its supervisory powers. Parts of the opinion may be read to support either interpretation. The court of appeals' remark that "[w]e do not say that agencies always violate due process when they fail to adhere to their procedures" (Pet. App. 11a) certainly suggests a constitutional underpinning for the suppression order in this case. On the other hand, the court's statement

Although the court of appeals held that there was not a valid "emergency" because Agent Yee had selected the dates for the meetings (Pet. App. 8a), we believe that the IRS and the Department of Justice were in a far better position to judge whether there had been substantial compliance with their regulations. The court's ruling in effect imposes a requirement that government's investigatory agents must attempt to arrange meetings with suspects more than 48 hours in advance if they believe that a recording of the conversation would be advisable, so that advance approval may be obtained from the Attorney General. Such a restriction is nowhere to be found in the Attorney General's Memorandum or in the IRS Manual, and it fails to take account of the realities of criminal investigations. Application of the "emergency" exception should not depend upon who proposes the date of the recorded meeting. In any event, whatever the legitimacy of the rule fashioned by the court of appeals in other circumstances, it has no application here, since nothing in the record suggests that Agent Yee manipulated the timing of the two meetings in order to avoid seeking Department of Justice approval.

that "the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach" (*id.* at 10a) indicates that the court may have been relying on its supervisory powers, since without a finding that the Constitution or a federal statute required suppression there would be no other authority for the court's action.

It matters little which rationale underlies the court of appeals' exclusion of the recorded conversations. The failure of an executive agency to comply with its internal regulations, at least where, as here, those regulations were not relied on by the defendant and were not intended for his benefit, does not justify the suppression of otherwise admissible and probative evidence in a criminal case.

I. The Internal Revenue Service's Failure to Obtain Approval from the Department of Justice Prior to Recording the January 31 and February 6 Conversations Did Not Deprive Respondent of Due Process of Law.

This Court has interpreted the Due Process Clause as "a summarized constitutional guarantee of respect for those personal immunities which * * * are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' * * * or are 'implicit in the concept of ordered liberty.'" *Rochin* v. *California*, 342 U.S. 165, 169, citing *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 and *Palko* v. *Connecticut*, 302 U.S. 319, 325. While the Clause thus places a substantial duty of fair dealing upon the government, its requirements are not boundless and do not encompass every investigative or prosecutorial practice that the judiciary believes to be wise. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559-561. As the Court recently observed, "[j]udges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.'" *United States* v. *Lovasco*, 431 U.S. 783, 790, quoting from *Rochin* v. *California*, *supra*, 342 U.S. at 170. See also *United States* v. *Russell*, 411 U.S. 423, 435. The task of a court when confronted by a due process claim is to determine whether the official conduct violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney* v. *Holohan*, 294 U.S. 103, 112, and that define "the community's sense of fair play and decency." *Rochin* v. *California*, *supra*, 342 U.S. at 173. Judged by these standards, the Internal Revenue Service's good faith failure to comply fully with the procedures outlined in its manual prior to recording respondent's conversations with Agent Yee does not even come close to supporting a claim that respondent was denied due process.

There is, to begin with, no principle of constitutional law that requires unyielding agency adherence to regulations. The cases most often cited for the contrary proposition are *Accardi* v. *Shaughnessy*, 347 U.S. 260, which involved Department of Justice regulations setting forth the procedure to be followed in processing an alien's application for sus-

pension of deportation, and two similar cases decided in *Accardi*'s wake, *Service* v. *Dulles*, 354 U.S. 363, and *Vitarelli* v. *Seaton*, 359 U.S. 535. The Court held in *Accardi* that the Department's regulations had "the force and effect of law" (*id.* at 265) and that they bound the Attorney General so long as they remained extant (*id.* at 267). This ruling, however, concerned the adjudicatory rather than the prosecutive functions of the Department of Justice and was grounded on principles of administrative procedure, not notions of due process transferable to other contexts. As the Court explained last Term, "both *Service* and *Accardi* * * * enunciate principles of federal administrative law rather than of constitutional law binding upon the States." *Board of Curators* v. *Horowitz*, No. 76-695, decided March 1, 1978, slip op. 14 n.8. See also *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 547 (opinion of Frankfurter, J.) (describing holding in *Service* as a "judicially evolved rule of administrative law"); *Bates* v. *Sponberg*, 547 F. 2d 325, 330 (C.A. 6).

Hence, the conclusion that the conduct of the IRS agents violated respondent's due process rights must be based on more than the agency's mere failure to follow its own rules. There must also be a showing that the oversight operated to treat respondent unfairly, in a way that offends "the community's sense of fair play and decency." *Rochin* v. *California*, *supra*, 342 U.S. at 173. After all, "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in

question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (plurality opinion; emphasis in original). In the present case there is no conceivable basis on which to predicate a violation of respondent's due process rights.

A. *The IRS Instructions to its Agents Were Not Intended to Create Rights Enforceable by a Defendant in a Criminal Case*

The IRS regulations at issue here, particularly IRS Manual ¶ 652.22, were promulgated in response to the Attorney General's October 1972 Memorandum entitled "Monitoring Private Conversations with the Consent of a Party" (Pet. App. 6a). In this memorandum, the Attorney General clearly explained the purpose of the agency regulations (App., *infra*, p. 5a):

> [A]lthough it is clear that [monitoring of conversations with the consent of one of the participants] is constitutionally and statutorily permissible—and therefore that it may be conducted without judicial warrant—it is appropriate that this investigative technique continue to be the subject of careful self-regulation by the Executive Branch of the Federal Government.

To achieve this end of "self-regulation," the Attorney General made Department of Justice officials responsible for the approval of all such government surveillance. He required that he or his delegate authorize any consensual monitoring in advance, and he detailed

the procedures for securing such authorization. These include a written statement of the reasons for the monitoring, including the role of the suspect in the investigation, as well as the duration and place of the electronic surveillance and the means by which it is to be accomplished (*id.* at 6a). Requests must ordinarily be submitted at least 48 hours prior to the proposed monitoring, but, when exigent circumstances preclude compliance, "emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him" (*id.* at 7a). In addition, careful recordkeeping of the use of surveillance equipment is required (*id.* at 9a).

Nothing in the Attorney General's Memorandum or the IRS Manual suggests that these procedures were intended to grant citizens protection against electronic monitoring of conversations beyond those already provided by the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, much less that those protections were intended to be enforceable in court. To the contrary, the rules requiring centralized decision-making plainly were designed "to provide some degree of internal governmental supervision over consensual overhearings" (*United States* v. *Kline*, 366 F. Supp. 994, 997 (D. D.C.))—that is, to obtain consistency in the utilization of costly, relatively uncommon, and marginally more intrusive investigative tools such as electronic monitoring, and to limit

such investigative techniques to instances where they would provide substantial assistance to law enforcement. Thus, the regulations "express[ ] a policy that is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants." *United States* v. *Walden*, 490 F. 2d 372, 377 (C.A. 4) (footnote omitted), certiorari denied, 416 U.S. 983.[8]

As such, they stand in marked contrast to the internal regulations in *Accardi*, which involved "safeguards against essentially unfair procedures" designed "to protect the interests of the alien and to

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[8] Respondent's contention (Br. in Opp. 13) that the IRS regulations were "intended to protect taxpayers, like Dr. Caceres, whom the IRS has under investigation or suspicion" stems from the unwarranted assumption that any internal agency requirement that serves to increase the difficulty of ferreting out proof of crime or of initiating a prosecution must have been meant for the benefit of those under investigation. This unsophisticated analysis cannot be correct, for virtually every regulation circumscribes the agent's discretion to some extent. Respondent's assumption fails to appreciate that many internal operating procedures, like IRS Manual ¶ 652.22, may have as their principal concern the efficiency of or the discipline within the agency and that any accompanying decrease in the agency's ability to pursue its investigations as fully as the Constitution or federal statutes allow may be nothing more than an unwelcome but unavoidable consequence. This is especially likely to be true in the case of regulations, such as those at issue here, that cannot affect the conduct of persons dealing with the agency.

afford him due process of law" (*Bridges* v. *Wixon*, 326 U.S. 135, 152, 153, cited in *Accardi* v. *Shaughnessy*, *supra*, 347 U.S. at 265 n. 7), or those in *Service* and *Vitarelli*, which also were intended to guarantee procedural fairness to the subjects of quasi-adjudicatory administrative proceedings (see *Service* v. *Dulles*, *supra*, 354 U.S. at 373; *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 540), or in *Yellin* v. *United States*, 374 U.S. 109, which concerned the refusal of the House Committee on Un-American Activities to follow rules that by their own terms were required to be distributed to each witness appearing before the Committee (*id.* at 123) and whose "dominant theme [was] definition of the witness' rights and privileges" (*id.* at 115).[6]

Indeed, on the occasions that this Court has confronted agency rules not primarily intended to benefit the accused, it has refused to grant relief over the agency's objection. In *Sullivan* v. *United States*, 348 U.S. 170, for example, the Court unanimously declined to dismiss an indictment obtained in violation of a Department of Justice directive that prohibited the submission of any income tax case to a grand jury without the prior approval of the Attorney General. Without citing *Accardi*, which had been decided only months earlier, the Court construed the guidelines as simply "housekeeping provision[s]," designed (like the IRS Manual) to achieve uniformity in the admin-

[6] See also *United States* v. *Nixon*, 418 U.S. 683, 695-697, requiring the President to adhere to regulations promulgated for the benefit of the Special Prosecutor.

istration of the revenue laws, and held that they were not subject to judicial enforcement at the behest of a defendant (*id.* at 173):

> It was not the purpose of the Executive Order to direct how the responsibility should be exercised but to fix it in the Department of Justice. How that responsibility was to be discharged was a matter for the Department.

And in *Rinaldi* v. *United States*, 434 U.S. 22, which involved a violation of the Justice Department's "*Petite* policy," prohibiting a federal prosecution following a state prosecution for the same act except when necessary to advance compelling interests of federal law enforcement, the Court stressed that the policy (again like the IRS Manual) was not constitutionally mandated (*id.* at 29), that it was promulgated in an effort to centralize authority in the Department's most responsible officials over a particularly sensitive class of prosecutions (*id.* at 28-29), and that a defendant should therefore receive the benefit of the policy "whenever its application is urged *by the Government*" (*id.* at 31; emphasis added).[7] See also *American Farm Lines* v. *Black Ball*

[7] The clear implication of this statement, that the Department's dual prosecution policy would not be enforced over the government's objection, is consistent with the unanimous decisions of the courts of appeals. See, *e.g.*, *United States* v. *Musgrove*, C.A. 4, No. 77-1971, decided August 7, 1978; *United States* v. *Thompson*, C.A. 10 (*en banc*), No. 76-1883, decided June 15, 1978, pending on petition for a writ of certiorari, No. 78-5087; *United States* v. *Fritz*, C.A. 10 (*en banc*), No. 77-1027, decided July 3, 1978; *United States* v. *Wallace*, C.A. 8, No. 77-1558, decided June 13, 1978; *United States* v. *Nelli-*

Freight Service, 397 U.S. 532, 538-539 (excusing an agency's failure to follow its own regulations because "[t]he rules were not intended primarily to confer important procedural benefits upon individuals * * *"); *United States* v. *Mapp*, 561 F. 2d 685, 690 (C.A. 7); *Associated Press* v. *Federal Communications Commission*, 448 F. 2d 1095, 1104 (C.A. D.C.); *United States* v. *Lockyer*, 448 F. 2d 417, 421 (C.A. 10).

There can, in short, be no unfairness in refusing to accord a defendant the benefit of an agency regulation that was neither required by the Constitution or by federal statutes nor adopted for his protection. The requirement of the IRS Manual that Department of Justice approval be obtained prior to the recording of face-to-face conversations was "simply a housekeeping provision of the Department" (*Sullivan* v. *United States*, *supra*, 348 U.S. at 173); the government officials who acted contrary to these instructions are of course "answerable to the Department" (*id.* at 174), but their conduct is not subject to challenge on due process grounds.[8]

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gan, 573 F. 2d 251, 255 (C.A. 5); *United States* v. *Welch*, 572 F. 2d 1359, 1360 (C.A. 9), pending on petition for a writ of certiorari, No. 77-6684; *United States* v. *Chavez*, 566 F. 2d 81 (C.A. 9); *United States* v. *Hutul*, 416 F. 2d 607, 626-627 (C.A. 7), certiorari denied *sub nom. Sacks* v. *United States*, 396 U.S. 1007.

[8] The IRS regulations provide for disciplinary action, including removal from the Service, for employees who knowingly violate those regulations. IRS Manual ¶ 652.1(3).

B. *Respondent's Conduct Could Not Have Been Affected by the Noncompliance With the IRS Regulations*

The Due Process Clause undoubtedly prevents the government from obtaining an unfair advantage over persons who have reasonably relied on official pronouncements intended to guide their actions. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 559, 569-571; *Raley* v. *Ohio*, 360 U.S. 423, 437-439. This reliance factor was a pivotal feature in *Yellin* v. *United States*, *supra*, 374 U.S. at 119-120, the only instance in which this Court has granted relief in a criminal case because of noncompliance with voluntarily-adopted rules, and was the crucial underpinning of the holdings in *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4), *United States* v. *Leahey*, 434 F. 2d 7 (C.A. 1), and *United States* v. *Sourapas*, 515 F. 2d 295 (C.A. 9), the sole authorities cited by the court of appeals to support its exclusion of the recorded conversations between respondent and Agent Yee.[9]

Heffner, *Leahey* and *Sourapas* concerned IRS regulations that required special agents investigating criminal tax fraud to give *Miranda*-type warnings to subjects of their investigation prior to conducting non-

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[9] Later decisions have stated unequivocally that *Heffner*, *Leahey* and *Sourapas* were grounded on due process. See *United States* v. *Newell*, C.A. 9, No. 77-3685, decided July 19, 1978, slip op. 2341; *United States* v. *Jobin*, 535 F. 2d 154, 157 (C.A. 1); *United States* v. *Griglio*, 467 F. 2d 572, 576 (C.A. 1); *United States* v. *Bembridge*, 458 F.2d 1262, 1264-1265 (C.A. 1); *Hollingsworth* v. *Balcom*, 441 F. 2d 419, 421-422 (C.A. 6).

custodial interviews.[10] In each case the agent neglected to deliver the prescribed warnings, the suspect made damaging admissions, and the court of appeals ordered the statements suppressed.

The justification for suppression, however, was not merely that the agency had violated its own regulations, but that the violation may have induced the taxpayer to alter his behavior to his detriment. As the Fourth Circuit explained in *Heffner*, if the IRS agent had followed the required procedures by giving *Miranda* warnings, the taxpayer would have been put on notice of his status as a suspect and would have been in a position to choose intelligently whether to make a statement or to decline to be interviewed, whether to sign the written transcript of the interview, and whether to seek the advice of counsel. 420 F. 2d at 813. Furthermore, in light of the wide publication given the IRS regulation, it was possible that the taxpayer had assumed that the agent's failure to inform him of his status as a target was an implicit representation that he was not suspected of criminal tax fraud. *United States* v. *Leahey, supra*, 434 F. 2d at 10-11. See also *United States* v. *Jobin*, 535 F. 2d 154, 158-159 (C.A. 1).

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[10] See IRS News Release Nos. 897, issued October 3, 1967, and 949, issued November 26, 1968, reprinted in *United States* v. *Heffner, supra*, 420 F. 2d at 811, and *United States* v. *Sourapas, supra*, 415 F. 2d at 297 n. 2. See also *United States* v. *Jobin, supra*, 535 F. 2d at 156 n. 3. These warnings are not required by the Constitution. *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495; *Beckwith* v. *United States*, 425 U.S. 341.

The arguments set forth elsewhere in this brief demonstrate, we believe, the impropriety of suppression even in the circumstances of *Leahey*, *Heffner* and *Sourapas*—which like this case involved a regulation that did not apply to trial-type proceedings—and the result of those cases has been judicially questioned. See *United States* v. *Leonard*, 524 F. 2d 1076, 1089 (C.A. 2) (Friendly, J.), certiorari denied, 425 U.S. 958; *United States* v. *Lehman*, 468 F. 2d 93, 104-105 (C.A. 7), certiorari denied, 409 U.S. 967.[12] But whatever may have been the correct result in those three cases, there is no reason to find a due process violation in the situation here.

Respondent did not know that his conversations were being recorded. *A fortiori*, he did not know that they were being recorded without Justice Department approval. His behavior in the face-to-face meetings with Agent Yee would not have differed one iota if Inspector Hill had applied for monitoring authority pursuant to IRS Manual ¶ 652.22(1) instead of

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[11] [Omitted]

[12] The First Circuit has limited *Leahey* in *United States* v. *Bembridge, supra*, 458 F. 2d at 1264 ("substantial compliance" is sufficient), and *United States* v. *Morse*, 491 F. 2d 149, 156 ("substance and spirit of such procedures, and not their literal form" must be followed). See also *United States* v. *Jobin, supra*, 535 F. 2d at 157. Other courts have followed a similar analysis. See, *e.g.*, *United States* v. *Bettenhausen*, 499 F. 2d 1223, 1231 (C.A. 10) (suspect must demonstrate a "substantial omission" prejudicing him); *United States* v. *Dawson*, 486 F. 2d 1326, 1330 (C.A. 5) (substantial compliance sufficient); *United States* v. *Mathews*, 464 F. 2d 1268, 1270 (C.A. 5) (literal compliance not required).

¶ 652.22(6) or if valid authorization had been obtained from the Attorney General in advance of the meetings.[13] By the same token, even if respondent had been aware of the IRS regulations prior to his conversations with Agent Yee, he could not possibly have made his incriminating statements in reliance upon the agent's compliance with the prescribed procedures. See *United States* v. *White*, *supra*, 401 U.S. at 752; *United States* v. *Gentile*, 525 F. 2d 252 (C.A. 2), certiorari denied, 425 U.S. 903; *United States* v. *Bland*, 458 F. 2d 1, 8 (C.A. 5), certiorari denied, 409 U.S. 843.[14] Violations of agency regulations that, ob-

[13] Respondent was of course well aware at all times that he was speaking to an IRS agent.

[14] In *United States* v. *Gentile*, *supra*, the court of appeals refused to exclude evidence of a bribe offer to an IRS agent despite the agent's failure to have complied fully with the regulation requiring that targets be given *Miranda* warnings in non-custodial interrogation. Judge Friendly explained (525 F. 2d at 259; citations omitted):

> The purpose behind the stipulation by the IRS of these procedures for special agents was to extend the protection of *Miranda* v. *Arizona*, 384 U.S. 436 * * * (1966), to criminal tax investigations conducted in a non-custodial setting. *United States* v. *Leahey*, *supra*, 434 F. 2d at 8. A failure to give *Miranda* warnings, however, even in a custodial setting, would not prevent a prosecution for an attempt to bribe a law enforcement officer made subsequent to the arrest. * * * [T]he basic purpose of *Miranda*, to prevent abusive police interrogation of persons not aware of their right to remain silent, hardly extends to tax evaders whose quick reaction is to offer to bribe the investigating officer and are then prosecuted for doing so. It seems even more unlikely that the IRS intended its News Releases to bar a Special Agent from telling the full story of an attempt to bribe him simply because he had failed to give the specified warnings.

served or not, can have no possible bearing on how individuals under investigation will conduct themselves cannot be said to deprive such individuals of due process of law.

C. *Compliance With the IRS Regulations Would Not Have Affected the Ultimate Outcome of the Agency's Action*

All else aside, it makes little sense to conclude that a violation of agency regulations has denied due process—much less to exclude probative and reliable evidence in a criminal trial as a sanction—if the violation had no bearing on the agency's ultimate actions. In such circumstances, although every procedural requirement may not have been observed, it can hardly be said that the person dealing with the agency was treated unfairly; suppression would be "a wasteful ritual" that would serve only to breed disrespect for the system and to afford the opposing party a "windfall." Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 634 (1974). If a "harmless error" rule may be applied to excuse inconsequential Executive Branch violations of the Constitution (see *Chapman* v. *California*, 386 U.S.

Cf. *United States* v. *Mandujano*, 425 U.S. 564, 583; *id.* at 585 (Brennan, J., concurring); *United States* v. *Wong*, 431 U.S. 174, 180 (Due Process Clause does not require suppression of false grand jury testimony, because the failure to receive Fifth Amendment warnings would not induce a witness to commit perjury).

18), federal statutes (see 28 U.S.C. 2111; *United States* v. *Chavez*, 416 U.S. 562, 575), and rules of criminal procedure (see Fed. R. Crim. P. 52(a); *Hamling* v. *United States*, 418 U.S. 87, 131-135), it certainly should be equally available in cases of an agency's noncompliance with self-imposed requirements.

There can be no serious dispute that the Department of Justice would have authorized Agent Yee's recording of his conversations with respondent if approval had properly been requested under the IRS Manual. As we have already noted, the Justice Department and IRS regulations at issue here were designed to permit responsible government officials to control the actions of their subordinates in an area of some sensitivity, so that consensual electronic surveillance would be limited to those important criminal investigations in which the technique would be a particularly valuable law enforcement tool. A taxpayer's bribe offers to influence the conduct of an IRS agent's official responsibilities is certainly a proper subject for such surveillance. Indeed, when a conversation constitutes not just evidence of a crime, but the crime itself, it is especially important to have the most reliable evidence possible of what was said. *United States* v. *White*, *supra*, 401 U.S. at 753 (plurality opinion).[15]

This conclusion does not rest on speculation: the Department of Justice approved monitoring on February 10, 1975, demonstrating that it considered this case to be appropriate for the use of a consensual re-

15. [See next page.]

cording device. It is inconceivable to suppose that such approval would have been withheld if Inspector Hill's written request had been received in the Department on January 31 rather than a week later. Accordingly, Agent Yee's recording of his meetings with respondent on January 31 and February 6, although not sanctioned by the Justice Department in advance, did not constitute agency conduct that would have been proscribed if the proper procedures had been followed.

D. *The Policies Underlying the Exclusionary Rule Do Not Justify Suppression of the Probative and Relevant Evidence Contained on the Tape Recordings Because of the IRS's Good Faith Violation of Its Internal Regulations*

The discussion thus far has demonstrated that the IRS agents' monitoring of respondent's conversations prior to obtaining Justice Department authorization did not violate the Due Process Clause. The regulations were not adopted for respondent's benefit, his incriminating statements could not have been made in reliance upon the regulations, and the recording of the conversations would have been authorized by the proper officials if the prescribed procedures had been scrupulously observed. Even were these conclusions less clear, however, suppression of the highly incriminating evidence contained on the tape recordings would nonetheless not be warranted in the circum-

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[15] Recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words.

stances of this case. All of respondent's Fourth Amendment and statutory rights were respected by the agents, and suppression of the recordings solely because of the IRS's good faith failure to follow its internal regulations would not further any of the policies justifying application of an exclusionary rule, and indeed might work against them.[16]

The core objective of the judicially-created exclusionary rule is the deterrence of unlawful government conduct in order to effectuate constitutional guarantees, especially the Fourth Amendment's protection against unreasonable searches and seizures. *United States* v. *Peltier*, 422 U.S. 531, 536-539; *United States* v. *Calandra*, 414 U.S. 338, 347; *Elkins* v. *United States*, 364 U.S. 206, 217. As the Court explained in *Michigan* v. *Tucker*, 417 U.S. 433, 447:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future

[16] Although the Court has remarked—in instances quite distinguishable from the present case—that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures," *Morton* v. *Ruiz*, 415 U.S. 199, 235, it has never suggested that this requirement should be enforced by the suppression of evidence. The remedy for the violations in *Accardi*, *Service* and *Vitarelli*, for example, was a remand to allow the agency to conduct a new administrative hearing. The sanction the court applied in this case, on the other hand, would entail an irremediable loss of evidence.

> counterparts, a greater degree of care toward the rights of an accused.

Despite its broad deterrent purpose, however, "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Recognizing that the suppression remedy is not "a personal constitutional right of the party aggrieved" (*id.* at 348) and that "if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice" (*Stone* v. *Powell*, 428 U.S. 465, 491), this Court on a number of occasions has declined to extend the exclusionary rule to situations in which the effectiveness of the sanction in deterring improper official conduct was outweighed by the significant societal costs that the rule exacts by excluding relevant evidence of criminal activity. See, *e.g.*, *Franks* v. *Delaware*, No. 77-5176, decided June 26, 1978, slip op. 11; *Stone* v. *Powell*, *supra*, 428 U.S. at 489; *United States* v. *Janis*, 428 U.S. 433, 454.

Even assuming that the exclusionary rule might properly be invoked upon proof of repeated and deliberate violations of agency regulations, so far as the record shows the noncompliance in this case was iso-

lated and accidental.[17] If the want of deterrent impact renders the exclusionary rule inapplicable in cases involving constitutional or statutory[18] violations, then surely it has no place where its deterrent effect would be negligible and the violation amounted to no more than an inadvertent non-compliance with an internal agency regulation. See *United States* v. *Feaster*, 494 F. 2d 871, 875-876 (C.A. 5), certiorari denied, 419 U.S. 1036; *United States* v. *Walden*, *supra*, 490 F. 2d at 376-377.[19] The appropriate rem-

[17] There is no basis for respondent's accusation (Br. in Opp. 11 n. 5) that the IRS, which believed in both instances that the situation called for application of the emergency authorization procedures of its regulations, acted in bad faith in failing to secure advance Department of Justice approval for the monitoring of the January 31 and February 6 meetings between Agent Yee and respondent. To the contrary, Inspector Hill completed his written request for monitoring authorization prior to January 31, although for unexplained reasons it was not delivered to the Justice Department by the IRS National Office until February 7. Neither court below found that the agent's conduct was motivated by a desire to circumvent the requirements of IRS Manual ¶ 652.22(1) and (2), and in light of the fact that approval was promptly granted when the request reached the Justice Department, no motive appears that would support a conclusion of willful misconduct.

[18] See, *e.g.*, *United States* v. *Donovan*, 429 U.S. 413; *United States* v. *Mendel*, C.A. 7, No. 77-1421, decided May 10, 1978, slip op. 10-11, pending on petition for a writ of certiorari, No. 78-144; *United States* v. *Amendola*, 558 F. 2d 1043, 1045 (C.A. 2); *United States* v. *Turner*, 558 F. 2d 46, 52-53 (C.A. 2); *United States* v. *Burgard*, 551 F. 2d 190, 193 (C.A. 8).

[19] See *United States* v. *Burke*, 517 F. 2d 377 (C.A. 2) (Friendly, J.), refusing to suppress evidence seized pursuant to a warrant that failed to conform to several nonconstitutional requirements of Rule 41, Fed. R. Crim. P. The court said that the exclusionary rule is " 'a blunt instrument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large.' For that reason courts should be wary in extending the exclusionary rule * * * to violations which are not of constitutional magnitude" (*id.* at 386; footnote omitted).

edy for any infraction of IRS regulations in such circumstances is a matter for the Executive Branch, not the court of appeals, to determine. *Sullivan* v. *United States*, *supra*, 348 U.S. at 174; *United States* v. *Leonard*, *supra*, 524 F. 2d at 1089.[20]

The court of appeals nonetheless applied an exclusionary rule without undertaking any analysis of the necessity for that sanction to encourage agency compliance with its regulations. There is no empirical evidence that such strong medicine was required. Violations of the IRS Manual are not widespread. Furthermore, executive departments have substantial

[20] The Fourth Amendment exclusionary rule was formulated to protect important constitutional rights in the absence of any meaningful alternative sanction. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411-424 (Burger, C. J., dissenting). Since the Amendment itself provides no remedy for its violation, it was legitimate for the judiciary to imply one in light of the magnitude of the interests at stake. It is quite another matter for the courts to imply a suppression remedy for violations of requirements embodied in regulations that explicitly provide for other remedies. Here, for example, IRS Manual ¶ 652.1(3) states that disciplinary action may be taken against employees who knowingly violate the regulations. Having created and defined the legal standard, the agency should have plenary authority to determine the appropriate sanction for noncompliance.

incentives, wholly apart from any penalties imposed by the courts, to ensure that their own procedures, presumably adopted for their own benefit, are observed—incentives that might well be absent when the procedure has been imposed by the Constitution or by statute. See *United States* v. *Leonard*, *supra*, 524 F. 2d at 1089. There is no better example of this self-regulation than the Department of Justice's enforcement of its "*Petite* policy" (see page 25, *supra*). The Department frequently declines to authorize dual prosecutions in cases not presenting compelling circumstances, and it has not hesitated to seek dismissal of indictments obtained in violation of the policy, even after conviction. See, *e.g.*, *Rinaldi* v. *United States*, *supra*; *Frakes* v. *United States*, No. 77-5742, decided March 6, 1978; *Watts* v. *United States*, 422 U.S. 1032; *Ackerson* v. *United States*, 419 U.S. 892. See also *Redmond* v. *United States*, 384 U.S. 264 (violation of obscenity prosecution guidelines).

Moreover, there are strong countervailing interests that militate in favor of admitting the recordings in this case. The court of appeals did not rule that Agent Yee could not testify at respondent's trial about the alleged bribe offers that occurred on January 31 and February 6, 1975 (see Pet. App. 11a), and we know of no reason why such testimony would be disallowed. Suppression of the recordings of those transactions thus disserves the fact-finding function of the trial, since "[a]n electronic recording will many times produce a more reliable rendition of

what a defendant has said than will the unaided memory of a police agent" (*United States* v. *White*, *supra*, 401 U.S. at 753 (plurality opinion)).

An even more important consideration is that the extension of the exclusionary rule to cases such as this is not only unjustified by the policies underlying the rule, but actually tends to produce results that are contrary to those that the rule seeks to foster. The broad role of the exclusionary rule is to encourage governmental respect for citizens' constitutional and statutory rights, rights that were not created, and obviously cannot be abolished, by the Executive Branch. Many government agencies have voluntarily adopted internal guidelines and regulations that have an essentially similar purpose: to protect societal or individual interests that, while not so fundamental as to command constitutional or statutory protection, are nonetheless significant. The adoption of these regulations, unlike the Constitution or statutes, rests in the unfettered discretion of the individual agencies.

Such guidelines should obviously be encouraged. By imposing objective standards they promote respect for the law and uniformity in treatment by government officials, undeniable goals of the criminal justice system. Use of the exclusionary rule to punish the government for an inadvertent failure to follow its regulations, however, will inevitably tend to discourage adoption of such regulations in the first place. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 474 n. 580 (1974).

The decision whether to promulgate such regulations involves a careful balancing of costs and benefits. If minor deviations from self-imposed rules cause evidence to be lost, agencies may reasonably determine that the logical alternative is to cease self-regulation altogether in favor of increased *ad hoc* and diffuse decisionmaking. Hence, application of the suppression remedy in this context will give the defendant "an altogether disproportionate reward" (*United States* v. *Burke*, *supra*, 517 F. 2d at 386), yet society will receive no offsetting benefit. Indeed, society will suffer twice: criminal prosecutions will be impeded, and the government will be deterred from adopting salutary rules and practices that go beyond what the Constitution or a statute may require.

II. The Court Of Appeals Had No Supervisory Power To Suppress The Lawful Recordings Of Respondent's Conversations With Agent Yee

We remarked at the outset that it was uncertain whether the court of appeals' suppression of the tape recorded conversations between respondent and Agent Yee had been based upon the application of a constitutional exclusionary rule or upon the court's supervisory power over proceedings in the district courts in its circuit. Although the conclusion cannot be asserted with assurance in light of the ambiguities in the court's opinion, it seems tolerably clear that the court of appeals did not purport to be exercising supervisory authority. The court nowhere mentioned its supervisory powers, and the only

cases it cited to support suppression of the evidence involved constructions of the Due Process Clause. See page 27, note 9, *supra*.[21] What is more, the Ninth Circuit in a number of recent cases has disclaimed reliance on a broad "supervisory power" over the actions of coordinate branches of government. See *United States* v. *Hall*, 559 F. 2d 1160, 1164 and n. 2 (C.A. 9), certiorari denied, No. 77-974, March 27, 1978; *United States* v. *Chanen*, 549 F. 2d 1306, 1313 (C.A. 9), certiorari denied, 434 U.S. 825.

If, despite these indications to the contrary, the court of appeals in fact suppressed the tape recordings in the exercise of its supervisory authority, it erred for the reasons we have elaborated in our brief in *United States* v. *Jacobs*, No. 76-1193, certiorari dismissed as improvidently granted, May 1, 1978.[22] As we discussed in *Jacobs*, whatever the source and proper scope of the judicial supervisory powers, this Court's decisions clearly establish two limitations on its exercise. First, the supervisory power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. This limitation was adverted to in *McNabb* v. *United States*, 318 U.S. 332, 341 n. 6, and expressly declared in *Palermo* v. *United States*, 360 U.S. 343, 353 n. 11: "The power of this Court to prescribe rules of procedure and evidence for the

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[21] See also *United States* v. *Newell*, *supra*, slip op. 2341.

[22] We are sending respondent a copy of our brief in *Jacobs*.

federal courts exists only in the absence of a relevant Act of Congress." [23]

Second, even when not precluded by an Act of Congress, the courts' use of supervisory powers to exclude material evidence must be "sparingly exercised," and then only when "overriding considerations" justify it. *Lopez* v. *United States, supra,* 373 U.S. at 440. "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *Elkins* v. *United States, supra,* 364 U.S. at 216.

A decision by the court below to suppress the tape recorded conversations under its supervisory powers would have disregarded both of these limitations. As we explained in *Jacobs,* two Acts of Congress—Rule 402 of the Federal Rules of Evidence and 18 U.S.C. 3501—prohibited the court's exercise of any supervisory power it might otherwise have to suppress evidence of respondent's relevant and voluntary self-incriminating statements to Agent Yee.[24]

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[23] See also *Gordon* v. *United States,* 344 U.S. 414, 418; *Wolfle* v. *United States,* 291 U.S. 7, 13; *Funk* v. *United States,* 290 U.S. 371, 374-375, 379, 382.

[24] Section 3501 provides that "a confession"—defined to mean "any self-incriminating statement"—"shall be admissible in evidence if it is voluntarily given." There is no question that respondent's offers of money in exchange for Agent Yee's favorable disposition of respondent's audit were both "self-incriminating" and "voluntarily given."

Rule 402, Fed. R. Evid., provides that "[a]ll relevant evidence is admissible" except as otherwise provided by the Constitution, by statute, by the Rules of Evidence themselves, "or by other rules prescribed by the Supreme Court pursuant to statutory authority." In enacting this Rule, Congress withdrew from all federal courts save the Supreme Court any power to fashion special rules of evidentiary exclusion and permitted the Supreme Court to act in this regard only "pursuant to statutory authority" (*i.e.,* through its rule-making function, not in adjudication of cases).

Moreover, even assuming that these two Acts are not controlling here, suppression would be inappropriate because there was no "manifestly improper conduct by federal officials." *Lopez* v. *United States, supra,* 373 U.S. at 440.[25] The IRS agents' decision to monitor respondent's bribe offer was legitimate, the recordings of that conversation complied with all constitutional and statutory requirements, and any deviations from the agency's internal guidelines occurred in good faith. Hence, the Court's admonitions in *Lopez,* also in the context of a motion to suppress recordings of a defendant's face-to-face conversations with an IRS agent whom he had attempted to bribe, are equally applicable here (373 U.S. at 440):

> The function of a criminal trial is to seek out and determine the truth or falsity of the

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[25] Indeed, exercise of supervisory authority over law enforcement practices of the Executive Branch would be less justified here than in *Jacobs.* Suppression in that case arguably could have been explained in terms of the court of appeals' "supervision" of conduct occurring before the grand jury, an arm of the court.

charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

When we look for the overriding considerations that might require the exclusion of the highly useful evidence involved here, we find nothing. There has been no invasion of constitutionally protected rights, and no violation of federal law or rules of procedure. Indeed, there has not even been any electronic eavesdropping on a private conversation which government agents could not otherwise have overheard. There has, in short, been no act of any kind which could justify the creation of an exclusionary rule.

See also *Funk* v. *United States*, *supra*, 290 U.S. at 381; *United States* v. *Grimes*, 438 F. 2d 391, 395 (C.A. 6), certiorari denied, 402 U.S. 989; *United States* v. *Jones*, 433 F. 2d 1176, 1181-1182 (C.A. D.C.), certiorari denied, 402 U.S. 950; *United States* v. *Quarles*, 387 F. 2d 551, 555-556 (C.A. 4), certiorari denied, 391 U.S. 922.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1978.

APPENDIX

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

Oct. 16, 1972

MEMORANDUM TO THE HEADS OF
EXECUTIVE DEPARTMENTS AND AGENCIES

Re: Monitoring Private Conversations with the Consent of a Party

This memorandum concerns the investigative use of electronic and mechanical devices secretly to overhear, transmit, or record private conversations when one or more of the parties to the conversation is a Federal agent or is cooperating with a Federal agent and has consented to the overhearing, transmitting, or recording of the conversation. This memorandum does not restrict any form of monitoring when all parties to the conversation consent, nor does it affect existing instructions on the related matter of electronic surveillance without the consent of any party to a conversation. (See Manual for Conduct of Electronic Surveillance under Title III of Public Law 90-351; and Outline of Duties and Responsibilities of Attorneys and Agency Personnel Involved in the Conduct of Title III Court Authorized Interceptions, distributed Nov. 3, 1970).

I. The Law On Monitoring Private Conversations with the Consent of a Party.

The Supreme Court of the United States has for some time distinguished between electronic surveillance of a conversation without the consent of any of the participants, which in most circumstances is constitutionally impermissible without court order, and the monitoring of a conversation with the consent of one but not all of the participants. See *On Lee* v. *United States*, 343 U.S. 747 (1952) (informant carrying concealed transmitter); *Lopez* v. *United States*, 373 U.S. 427 (1963) (agent carrying concealed recorder); *Rathbun* v. *United States*, 355 U.S. 107 (1957) (police officer listening on extension telephone). While the decisions in the cases involving consensual monitoring have been predicated on various grounds, it is apparent that the central difference between consensual monitoring and non-consensual electronic surveillance is that in the consensual situations there exists one party to the conversation who is working with the government and who will relate to the government the substance of the conversation, and that in such situations the monitoring serves simply to provide instantaneous communication and to assure effective corroboration. The government in such situations gains access to no information it would not otherwise have obtained; it simply obtains it faster and in a more probative form. This essential difference was recently emphasized by the Supreme Court [in] *United States* v. *White*,

401 U.S.C. [sic] 745 (1971) decided April 5, 1971, in which the Court held that a Federal agent could properly testify to statements he had overheard a defendant make to a government informer by means of a secret transmitting device which the informer had concealed on his person at the time. Announcing the judgment of the Court, Mr. Justice White stated:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. * * * For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, * * * (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. * * * If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.
>
> * * * [T]he law permits the frustration of actual expectations of privacy by permitting au-

thorities to use testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants * * *. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. [Citations omitted.]

The Court in *White*, after noting that there was no constitutional prohibition against the monitoring of conversations with the consent of one party, called attention to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That statute, in the subsection enacted as 2511(2) of Title 18 of the United States Code, excepted consensual monitoring from its coverage as follows:

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire [i.e., telephone] or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.
>
> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious

> act in violation of the Constitution or laws of the United States or of any State or for the purposes of committing any other injurious act.

II. Administrative Regulations Concerning Consensual Monitoring Conversations.

The monitoring of conversations with the consent of one of the participants is a particularly effective and reliable investigative technique, and its use by Federal agents in investigating criminal cases is encouraged where appropriate and is expected where necessary. Nevertheless, although it is clear that such monitoring is constitutionally and statutorily permissible—and therefore that it may be conducted without judicial warrant—it is appropriate that this investigative technique continue to be the subject of careful self-regulation by the Executive Branch of the Federal Government. Accordingly, the following restrictions will apply in all criminal investigations employing the consensual monitoring of conversations.

(a) Conversations other than telephone conversations.

All Federal departments and agencies shall, except in exigent circumstances as discussed below, obtain the advance authorization of the Attorney General or any designated Assistant Attorney General [or Deputy Assistant Attorney General]* before using any mechanical or electronic device to overhear, trans-

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* The phrase in brackets was added by an amendment issued by Attorney General Richardson on September 4, 1973.

mit, or record private conversations other than telephone conversations without the consent of all the participants. Such authorization is required before employing any such device, whether it is carried by the cooperating participant or whether it is installed on premises under the control of the participant.

Requests for authorization to monitor private conversations shall be addressed to the Attorney General, in writing, by the head of the department or agency responsible for the investigation, or his delegate, and shall state:

1. The reason why monitoring appears desirable, the means by which it would be conducted, the place in which it would be conducted, and its expected duration.
2. The names of the persons whose conversations would be monitored and their roles in the matter under investigation. When the name of the non-consenting party or parties is not known at the time the request for authorization is made, the department or agency making the request shall supply such information to the Attorney General within 30 days after the termination of the monitoring.
3. That it is the considered judgment of the person making the request that monitoring is warranted in the interest of effective law enforcement.

Requests for authorization will receive prompt consideration by the Attorney General or his designee.

To assure adequate time for considering a request and for notifying the requesting department or agency of the appropriate decision, it is important that each request be received by the Office of the Attorney General no less than 48 hours prior to the time of the intended monitoring. It should be clearly understood that the use of consensual devices will not be authorized retrospectively.

Where a request cannot be made in compliance with the 48-hour requirement, or in exigent circumstances precluding request for authorization in advance of the monitoring—such as the imminent loss of essential evidence or a threat to the immediate safety of an agent or informant—emergency monitoring may be instituted under the authorization of the head of the responsible department or agency or other agency official or officials designated by him. The Attorney General or his designee shall be notified promptly of any such monitoring and of the specific conditions that precluded obtaining advance approval, and shall be afforded the information enumerated above that would have been given in requesting advance approval. Each department and agency should develop procedures to assure that under such exigent circumstances its agents will be capable of acting expeditiously. The Attorney General or his designee shall be kept advised as to the identity of those officials who have been designated by department or agency heads to authorize such emergency monitoring.

(b) Telephone conversations.

Telephone conversations—because they involve the transmission of the participants' conversations through a complex and far-flung network of wires, the common use of multi-party lines and extension telephones, and the possibility of an unseen participant permitting another person to listen at the same telephone—have long been considered not to justify the same assumption of privacy as a face-to-face conversation. Nevertheless, there is still a need to provide for the supervision and control of consensual monitoring of telephone conversations. Accordingly, the current practice of charging each department and agency with the control of such consensual monitoring by its agents will continue. Each department and agency head shall assure the adoption or the continuation of agency rules on this subject. Such rules shall also provide for the expeditious, oral authorization of such monitoring where necessitated by exigent circumstances.

III. Security of monitoring devices.

It shall be the responsibility of the head of each investigating agency to procure and maintain only the minimum number of devices designed for the consensual monitoring of conversations that the agency reasonably needs, consistent with current policy, to overhear, transmit, or record private conversations for investigative purposes. The equipment shall be stored, as feasible, in one central location or in a

limited number of locations so as to facilitate administrative control.

An inventory shall be maintained on a current basis at each location at which monitoring equipment is stored. All equipment must be accounted for at all times. When equipment is withdrawn from storage a record shall be made as to the times of withdrawal and of its return to storage. By written report, the agent to whom the equipment is assigned shall account fully for the time he possessed the monitoring equipment and the uses he made of it. Equipment should be returned to storage when not in actual use except to the extent that returning the equipment would interfere with its proper utilization.

Each agency shall maintain copies of the complete inventories of equipment showing the times of withdrawals and returns, and copies of the written reports of the responsible agents specifying the uses made of the equipment. Such records should be retained for at least six years.

IV. Annual Reports.

The head of each investigative agency, or his delegate, shall submit to the Attorney General during July of each year a report containing (1) an inventory of all the agency's electronic and mechanical equipment designed for the monitoring of conversations, and (2) a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.

This Memorandum supersedes the Memorandum to the Heads of Executive Departments and Agencies, dated June 16, 1967, captioned "Wiretapping and Electronic Eavesdropping."

/s/ Richard G. Kleindienst
Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 76-1309

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 76-1309

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent

QUESTION PRESENTED

Whether the courts below correctly concluded that evidence acquired by electronic eavesdropping and monitoring in violation of investigative procedures promulgated by a federal administrative agency was seized in violation of the United States Constitution and so may properly be excluded from consideration in a criminal case.

STATUTORY AND OTHER PROVISIONS INVOLVED

The Government's presentation of the administrative regulations directly at issue in this case is complete. Respondent has cited other regulations that bear upon the interpretation of the regulations at issue. These are presented in the appendix ("Resp. App.") to this brief.

STATEMENT

Respondent, Dr. Alfredo L. Caceres, is charged with violating 18 U.S.C. § 201(b). In August 1975 Dr. Caceres was tried before a jury in the United States District Court for the Northern District of California. He raised defenses of entrapment and diminished mental capacity. The jury were unable to agree on a verdict, and the Court declared a mistrial. Before his second trial, Dr. Caceres retained new counsel and brought a motion to suppress evidence unlawfully seized by agents of the Internal Revenue Service ("IRS"). The district court found that substantial portions of the evidence in question—recordings of conversations which IRS agents made by means of electronic eavesdropping and monitoring—were obtained in violation of Internal Revenue Service Regulations and must be suppressed.

The electronic eavesdropping and monitoring on which Respondent's motion was based began in March 1974 during an audit of his individual and employment tax returns. Revenue Agent Robert K. Yee claimed that during March 1974 Dr. Caceres offered him a personal settlement in order to receive a favorable resolution of the audit (A. 20). On March 21, 1974, IRS personnel electronically eavesdropped on and recorded a conversation between Agent Yee and Dr. Caceres without Dr. Caceres's knowledge. No further investigation of Agent Yee's allegations of bribery occurred for the next ten months (A. 20-21).

On January 30, 1975, Agent Yee telephoned Dr. Caceres and proposed a meeting for the following day (A. 14-15). On February 5, 1975, Agent Yee again called Dr. Caceres and proposed a meeting for the following day (A. 16-17). During the two meetings thus arranged by Agent Yee for January 31 and February 6, 1975, IRS personnel conducted

electronic eavesdropping and monitoring against Dr. Caceres, resulting in the recordings that are the subject of this appeal. Agent Yee was wearing a concealed radio transmitter. Investigative agents, in a parked car in the vicinity of the meeting place, monitored and recorded the conversations using radio receiving and tape recording equipment (A. 69, 71).

The Internal Revenue Manual provides that IRS agents may engage in electronic eavesdropping on interviews with taxpayers only if they obtain prior written authorization from the Attorney General of the United States or his designee. Internal Revenue Manual ¶ 652.22(1). Inspector Hill, the agent in charge of the investigation, was familiar with this requirement and with the procedures by which authority had to be obtained (A. 30-31). Nonetheless the Government has conceded that the agents did not follow this procedure. Instead, they made an oral request to the Director of the Internal Security Division of the IRS. The apparent justification for the failure to comply with the prescribed procedure was that, in the agents' view, an emergency existed—despite the ten-month interval between Agent Yee's initial allegation and the electronic eavesdropping at issue here. In "emergency" cases, the Director of the Internal Security Division is empowered to grant authorization orally. Internal Revenue Manual ¶ 652.22(6).

On the basis of their conversation with the Director, the agents conducted electronic eavesdropping and monitoring against Dr. Caceres during his conversation with Agent Yee on January 31, 1975. No written request for authorization was drafted until that date (A. 36-37, 63). On February 7, 1975, one week after the written request was telecopied to Washington, the IRS submitted it to the Justice Department for review and approval (A. 78-79). In the meantime,

on February 6, the agents again conducted electronic eavesdropping and monitoring against Dr. Caceres, once again on the authority of a telephone conversation with one of their superiors within the IRS.

After hearing the agents' testimony, the district court found that there were no exigent circumstances in the investigation, and that "the only 'emergency' was created wholly by the IRS." (Pet. App. at 19a-20a)[1] Therefore, the Court concluded, the Government had not justified its failure to follow the standard authorization procedures set forth in the IRS regulations in conducting electronic eavesdropping and monitoring during the January 31, 1975 and February 6, 1975 conversations. The Ninth Circuit agreed and affirmed as to these conversations, stating:

> these "exigencies" were entirely government-created. [Citations omitted] There is no reason to believe that the requests could not have been made earlier. The investigation had been going on for some ten months, and the appellee was readily available for questioning during that time.

545 F.2d at 1186-87.

SUMMARY OF ARGUMENT

In this case agents of the Internal Revenue Service violated the specific, mandatory procedures promulgated by their agency to govern them in the gathering of evidence in IRS investigations. By this conduct, they failed to adhere to the lawful process that, by the agency's own judg-

1. The Government's statement in its opening brief ("Gov. Br." at 9) of the reasons for the district court's finding that there was not an emergency is incomplete. The district court also relied on the fact that the agents could offer no explanation for failing to seek authorization during the ten-month hiatus between the original allegation of bribery and the electronic eavesdropping and monitoring at issue here (Pet. App. at 20a).

ment, is due all citizens with whom IRS field personnel come into contact. They thus violated the Fourth and Fifth Amendments. The district court and the court of appeals properly concluded that evidence gathered in violation of these requirements must be excluded from the trial of a cirminal case.

I. The due process of law guaranteed to all citizens by the Fifth Amendment requires, above all, that those charged with the enforcement of the laws of the United States not be left free to act arbitrarily—according to caprice or prejudice. The obligation to observe this constitutional principle, to uphold the guarantee of due process, binds the Executive Branch no less than the legislature and the judiciary. When officials of the Executive Branch decide, in discharging this obligation, that specific procedural safeguards and standards should be observed for the protection of citizens under investigation, agents of the government are bound by that judgment.

A. Law enforcement officers must be governed by standards of conduct and orderly procedures designed to assure uniform and even-handed conduct in the execution of their official duties. The importance of such standards and procedures increases with the importance of the interests affected by law enforcement activity and is greatest where fundamental personal interests, such as privacy, are implicated. The constitutional requirement that official conduct be governed by reasonably specific standards and procedures applies not only to officials responsible for the final, adjudicative phase of the legal process, determining liability or guilt and ordering relief or imposing punishment, but also to those who initiate the legal process by conducting investigations. The prevention of overreaching and abuse of official authority requires not only that

agents carrying out investigations be guided by standards governing their day-to-day conduct, but also that the responsibility for deciding to use particularly sensitive, abuse-prone investigative techniques be vested in superior government officials in a position to exercise independent judgment and oversight, free from the influence and pressures of direct involvement in local investigations. Consistent with the generally flexible character of due process requirements, the stringency of the procedures appropriate for controlling investigative conduct varies according to the degree of potential for abuse inherent in the investigative technique at issue and the importance of the private and governmental interests affected. The courts have long recognized that electronic eavesdropping and monitoring are prone to abuse as an investigative technique.

B. The Department of Justice and the Internal Revenue Service have developed regulations directly responsive to the foregoing constitutional requirements. The text and history of the development of the regulations show that they were designed to protect the constitutional rights of citizens under investigation by the IRS, and specifically to protect important personal interests in privacy and uniform administration of the law. A survey of the kinds of regulations the lower courts have been called upon to enforce, either by overturning agency action or applying exclusionary sanctions, confirms that the regulations involved here are not mere housekeeping provisions designed to improve internal agency efficiency.

C. Where an agency of the government has adopted regulations designed to protect citizens against whom it conducts investigations, agency personnel are not at liberty to act on their own. They are obliged to respect the restrictions thus imposed on their conduct unless and until the regulations are changed. Failure to comply with such

regulations violates the Due Process Clause of the Fifth Amendment. Absent the development of regulations by an agency or by the legislature, the courts must conduct their own inquiry to determine what restraints the requirements of due process of law place upon the conduct of the agency's investigative personnel. This inquiry calls for a balancing of the government's interest in efficient enforcement of the law, free from excessive cost and undue restriction, and the interests of private citizens affected by the investigative activity in question. If an agency has adopted regulations to protect those it investigates, however, the courts are not called upon to perform this difficult balancing of interests—unless the regulations themselves are attacked as failing to meet the constitutional minimum. In adopting the regulations, the agency itself has done the balancing. In the context of its own law enforcement mission, it has weighed the interests of those it investigates against whatever costs and disadvantages may be imposed by the procedure in question and has decided that this much process is due. The enforcement-level agents who conduct investigations are bound by this judgment.

II. The courts below correctly concluded that the proper remedy for this constitutional injury is exclusion of the unlawfully obtained evidence. Their decisions conform to principles this Court has articulated in applying the exclusionary rule, and the Government has failed to demonstrate any basis for exempting the conduct of its agents from this remedy.

A. In excluding the results of the agents' unlawful eavesdropping and monitoring, the courts below applied the remedy that this Court for many years has sustained as the only effective judicial response to violations of constitutional rights. The rationale for this remedy is the necessity

of deterring unlawful conduct by depriving the government of the product of such conduct. The decisions of the courts below are fully consistent with this rationale. The difficulties of deterring violations of complex and subtle due process formulas imposed on law enforcement agencies by the judiciary, and calling for instantaneous exercises of delicate judgment, simply are not presented where the unlawful conduct violates the agency's own policy manual.

B. The Government's objections to application of the exclusionary rule here are based largely on the assertedly exceptional circumstances of this case: that if the species of unlawful conduct at issue here—violations of law enforcement agencies' own regulations—are punished by exclusion of evidence, the protective procedures will be repealed; and that the misconduct in this case is not sufficiently serious to warrant exclusionary sanctions. The hypothesized threat of abandonment of the regulations is not supported or supportable by the experience of the agency and is inconsistent with the Government's assertion that the agency's disciplinary powers effectively prevent violations of its regulations. The Government's view of the seriousness of the agents' misconduct is simply a disagreement with the lower courts' findings, the correctness of which, as the Government acknowledges, is not presented on this appeal.

III. The supervisory power of the federal courts provides an alternative basis for the decisions of the courts below. Irrespective of constitutional or statutory requirements, this power may be exercised to exclude evidence acquired by substantial and serious violations of procedural rules designed to protect important personal interests. These preconditions to the exercise of supervisory power have been satisfied here. If the Court were to conclude that due process principles were incorrectly applied by the lower

courts, this case should be remanded to the district court for a factual inquiry into whether discretionary exercise of its supervisory power is warranted.

I. THE FAILURE OF THE IRS AGENTS TO COMPLY WITH THEIR AGENCY'S REGULATIONS GOVERNING ELECTRONIC EAVESDROPPING AND MONITORING VIOLATED THE REQUIREMENTS OF DUE PROCESS OF LAW.

In its brief to this Court, the Government makes, in essence, the following argument: under the Court's decision in *United States v. White*, 401 U.S. 745 (1971), electronic eavesdropping and monitoring by the government, where one of the parties to a conversation consents to the intrusion, does not affect any constitutionally protected interests of the other. Accordingly, the IRS regulations governing such investigative activity are a matter purely of Executive grace. If the Court, therefore, were to hold the IRS to its own regulations, by excluding the product of eavesdropping and monitoring obtained in direct violation of them, the IRS might be moved to withdraw the regulations and the protection they provide altogether.

We believe this argument is based on fundamentally mistaken premises. It ignores the vital place in due process protections of the government's willingness and ability to regulate itself. In recent years this Court increasingly has recognized the centrality of this principle to judgments both of Fourth Amendment reasonableness and of due process. Indeed, the Executive Branch itself has acknowledged the principle's force and has complied with it to the extent of issuing regulations like those presented here—regulations designed to structure the intrusive power of government, and so to ensure that the power is exercised, and individual interests in privacy are abridged, only in circumstances of manifest necessity and under procedures that minimize the possibilties of abuse.

We detail the development of this principle below, both in judicial decisions and in the Executive's practice. The regulations are not a matter of Executive grace. They are essential to reasonableness under the Fourth Amendment. They provide, moreover, the government's own calculation of the due process balance between effective tax law enforcement and fairness to individuals subject to investigation. They provide, in short, the government's own judgment of what due process requires. Under an unbroken line of decisions by this and the lower federal courts, the government is obliged to comply with its own regulations, and they are subject to judicial recognition and enforcement when it does not.

A. Due Process of Law Requires the Executive Branch to Regulate Consensual Electronic Eavesdropping and Monitoring.

1. *Consensual electronic eavesdropping and monitoring affect constitutionally protected interests in privacy and uniform administration of the law.* Standardless enforcement of the law is inconsistent with the Due Process Clause of the Fifth Amendment. *See Herndon v. Lowry*, 301 U.S. 242, 261-64 (1937); *United States v. Reese*, 92 U.S. 214, 221 (1876). A law that fails to define clearly the standard of conduct to which private citizens are to be held is unconstitutional not only because it fails to give notice of what behavior will and will not be punished, but also because it gives to those who must decide, in particular instances, whether the law has been violated an intolerable license to apply powerful public sanctions arbitrarily against private citizens. *See Smith v. Goguen*, 415 U.S. 566, 573-76 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Although this void-for-vagueness doctrine was first articulated in decisions passing upon the constitutionality of criminal statutes, administrative regulations are subject to the same scrutiny. *E.g., Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *White v. Roughton*, 530 F.2d 750, 753-54 (7th Cir. 1976). Even broad delegations of authority by the legislature to administrative agencies, although valid in themselves, do not dispense with the basic requirement of reasonably specific standards and regular procedures. On the contrary, where the legislature has not spelled out specific standards to govern agency action, the need for the agency to adopt such standards through its own processes is all the more compelling. *See California Bankers Assn. v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring); *Morton v. Ruiz, supra*, 415 U.S. at 231; *Amalgamated Meat Cutters & Butcher Work. v. Connally*, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (three-judge court, *per* Leventhal, J.).

The requirements of due process are not confined to the final phase of law enforcement. A broad range of due process restrictions are applicable at the investigative stage of governmental action. *See, e.g., United States v. Lovasco*, 431 U.S. 783 (1977); *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969); *United States v. Briggs*, 514 F.2d 794, 804-06 (5th Cir. 1975); *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974). The requirement that the discretion of law enforcement agents be controlled by specific standards and procedures is among these due process restrictions. In *Smith v. Goguen, supra*, for example, the Court condemned grants of law enforcement authority whose "standardless sweep" entrusts the broad determination of what is and is not proscribed by the law "'to the moment-to-moment judgment of the policeman on his beat.'" 415 U.S. at 575; *see Grayned v. City of Rockford, supra*, 408 U.S. at 108-09; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170

(1972). Specific standards and procedures are required not only at the stage at which the sanctions of the law, such as arrest, are imposed, but also at the early stages of the development of a proceeding, when the preliminary steps of gathering evidence are taken. *E.g., Marcus v. Search Warrant,* 367 U.S. 717, 731-33 (1961).

The conduct of investigative agents must be governed by specific standards and procedures relating not only to the substantive law they enforce, but also to the investigative techniques they use. The degree of stringency called for in such standards and procedures varies according to the potential for abuse inherent in particular investigative techniques. The use of electronic eavesdropping equipment is an inherently dangerous weapon of law enforcement. *Berger v. New York,* 388 U.S. 41, 45-49 (1967); *Lopez v. United States,* 373 U.S. 427, 441 (1963) (Warren, C.J., concurring). In *Berger* the Court noted that "the 'indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments,' and imposes 'a heavier responsibility on this Court in its supervision of the fairness of procedures. . . .'" 388 U.S. at 56 (quoting *Osborn v. United States,* 385 U.S. 323, 329 n. 7 (1966)). Electronic eavesdropping not only permits government agents to hear what they otherwise could not hear, but also enables the government surreptitiously to collect and store vast amounts of information with disturbing ease. *See United States v. United States District Court,* 407 U.S. 297, 312-13 & n. 13 (1972). *See generally Whalen v. Roe,* 429 U.S. 589, 605 (1977).

Standards and procedures serve to ensure evenhandedness and uniformity in the government's dealings with the public. The caution the Court has required in the use of particularly abuse-prone investigative techniques illustrates

that uniform standards and procedures also are essential to protect other important personal interests, apart from the interest in evenhandedness. The range of private interests that come within the protection of the Fifth Amendment's Due Process Clause reflects the ideas of liberty traditionally held fundamental in Anglo-American law. *Moore v. East Cleveland,* 431 U.S. 494, 501-02 (1977) (opinion of Powell, J., quoting *Poe v. Ullman,* 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting)). The interest of every citizen in freedom from undue intrusion into personal privacy has always occupied a prominent place in traditional ideas of liberty. *See, e.g., Roe v. Wade,* 410 U.S. 113, 152-53 (1973); *Katz v. United States,* 389 U.S. 347, 352-54 (1967); *Griswold v. Connecticut,* 381 U.S. 479, 484-85 (1965).[2] In particular, the value of privacy has been thought to be strongest in the context of investigations by law enforcement officers. *See, e.g., United States v. Calandra,* 414 U.S. 338, 348 (1974); *Boyd v. United States,* 116 U.S. 616, 630 (1886). During the decades immediately preceding the adoption of the Constitution, the practice of providing vaguely drawn general warrants and writs of assistance to collectors of the revenue and other law enforcement officers was widely condemned as destructive of privacy. *See, e.g., Marshall v. Barlow's, Inc.,* ..... U.S....., 56 L.Ed.2d 305, 310-11 (1978); *United States v. Chadwick,* 433 U.S. 1, 7-8 (1977); *United States v. United States District Court, supra,* 407 U.S. at 316-17; *Berger v. New York, supra,* 388 U.S. at 58; *Boyd v. United States, supra,* 116 U.S. at 625-26.

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2. Due process protection is not confined to interests that are themselves embodied in some independent constitutional right. *See Goldberg v. Kelly,* 397 U.S. 254, 261-63 (1970); *Keller v. Kate Maremount Foundation,* 365 F. Supp. 798, 801-02 (N.D. Cal. 1972). If the reach of due process were thus limited, its protection would be redundant.

That the use of electronic eavesdropping equipment affects all citizens' interests in personal privacy is clear. There can no longer be any doubt that, irrespective of the technicalities of trespass and property law, electronic eavesdropping impinges upon personal privacy and therefore must be conducted within constitutional limitations. *Katz v. United States, supra,* 389 U.S. at 352-54. The impingement on privacy caused by electronic eavesdropping is not confined to nonconsensual intrusions—where neither party to a communication has authorized the monitoring.[3] In *Osborn v. United States, supra,* two federal judges authorized the Department of Justice to arrange for a witness in a pending criminal case to carry a concealed tape recorder into meetings with an attorney in the case suspected of jury tampering. The Court refused to exclude tapes of these conversations.[4] In explaining *Osborn* in *Berger v. New York, supra,* the Court noted that there it had found that "the recording, although an invasion of privacy protected by the Fourth Amendment, was admissible because of the authorization of the judges. . . ." 388 U.S. at 56-57.

As the Court stated in *Katz v. United States, supra,* 389 U.S. at 351, the Fourth Amendment protects people, not places. Thus to evaluate the privacy interests that are affected by consensual monitoring and eavesdropping, it is necessary to identify the classes of persons affected.

3. As discussed below the history and purpose of the IRS regulations demonstrate that the government itself has recognized the impact of consensual electronic eavesdropping and monitoring on privacy. *See* pp. 32-38, *infra.*

4. The Court concluded that the intrusion occurred "under the most precise and discriminate circumstances," and fully complied with " 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' " 385 U.S. at 329-30 (quoting from *Eaton v. Price,* 364 U.S. 263, 272 (1960) (separate opinion)).

These interests cannot be analyzed merely by considering the circumstances of those who have committed crimes. If, simply by executive self-restraint, governmental intrusions could be confined to cases in which evidence of criminality is in fact discovered, or at least legitimately suspected, the Fourth Amendment would not be needed. Obviously the only cases presented to the courts are those in which some potentially probative evidence is acquired by the disputed search or seizure: otherwise the defendant would not object by moving to exclude the evidence. The courts thus see only the tip of the iceberg. *See Elkins v. United States,* 364 U.S. 206, 217-18 (1960).[5]

In every Fourth Amendment case, the issue is not whether the Constitution should relieve those committing or contemplating criminal activity of the risk that evidence of their crimes may be discovered, but rather how to "redistribute the privacy risks throughout society," so as to confine governmental intrusions to situations in which criminal activity is afoot, in a manner consistent with the legitimate needs of law enforcement agencies. *See United States v. White, supra,* 401 U.S. at 789 (Harlan, J., dissenting). In this case, the issue is whether unrestrained and indiscriminate consensual electronic eavesdropping and monitoring, unrelated to the investigation of persons properly suspected of criminal activity, impinge significantly upon personal privacy. The interests of every citizen in

5. The Government no doubt takes the view that the electronic eavesdropping and monitoring at issue in this case were not indiscriminate or without proper foundation—that criminal activity was afoot. Its statement that a bribe occurred during the recorded conversations (Gov. Br. at 32) is, of course, a partisan assertion to be tested at trial. In any event, that contention does not bear upon the quality of the privacy interests affected, but rather upon the nature of the restraints necessary to protect these privacy interests. This latter issue—the question of how much process is due—is discussed below.

maintaining anonymity from his government, in the prevention of injurious circulation of the details of his private affairs, and in the confidentiality of private conversations as to which neither party has sanctioned a governmental intrusion demonstrate the serious threat to privacy posed by consensual electronic eavesdropping and monitoring.

Personal privacy is, in part, an interest in being let alone. Brandeis and Warren, *The Right to Privacy,* 4 Harv. L. Rev. 193, 195-96 (1890). That interest does not evaporate upon the disclosure of personal information to a single individual. Every citizen has a legitimate interest in maintaining a certain anonymity from his government—in not having government officials systematically collect and store up for later use whatever information they may chance upon in the course of their duties. Simply put, every citizen has an interest in not having his government keep track of his personal affairs—his communications, his comings and goings, his associations and relationships. *See generally, N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462-63 (1958). This privacy interest was recognized in *United States v. Holmes,* 521 F.2d 859 (5th Cir. 1975), *aff'd en banc by an equally divided court,* 537 F.2d 227 (1976), in which the Fifth Circuit held that the Fourth Amendment requires prior judicial authorization for the surreptitious attachment of a radio transmitter to a vehicle under surveillance by the police.[6] It may be conceded that the government is entitled to impinge upon that interest in a variety of ways, and need not always have a compelling

6. The dissenters in *Holmes* did not premise their dissent on the absence of a privacy interest, but rather on the view that a lesser procedural protection—a "reasonable suspicion" or probable cause standard—sufficiently protected personal privacy without the added security of prior judicial authorization. 537 F.2d at 228; *see United States v. Curtis,* 562 F.2d 1153, 1155-56 (9th Cir. 1977).

justification for doing so. Recognition of this broad range of competing governmental interests, however, does not gainsay the existence or the importance of freedom from indiscriminate government surveillance, regardless of the method by which it is accomplished. *See United States v. White, supra,* 401 U.S. at 786-87 (Harlan, J., dissenting).

Entirely apart from any interest in limiting the government's power to engage in indiscriminate surveillance, every citizen also has an interest in preventing needless, injurious circulation of confidential and often embarrassing information about himself to unintended audiences. This interest has long been recognized by the law of torts, which gives a cause of action for injurious and unprivileged publication of the details of a person's private life, even though such publication is true. The protection accorded this interest, of course, does not depend on whether the damaging, true information was acquired unlawfully, or whether the absolute secrecy of the information had been qualified previously by some disclosure to a limited audience. Restatement (Second) of Torts §§ 652A, 652D (1966).[7] A law enforcement agent or informer is free to communicate the contents of a conversation not because the other party has no privacy interest in the conversation, but rather because law enforcement officials and those working with them are privileged to communicate damaging information by virtue of the public policy in favor of effective law enforcement. The practical impact of disclosure to unintended audiences extends beyond the boundaries of causes of action recognized under state law. Even if not actionable, the disclosure of statements not made to be

7. Tax investigations, like a wide variety of other governmental inquiries, often focus upon financial transactions that cannot be discussed without revealing sensitive personal information. *See California Bankers Assn. v. Shultz, supra,* 416 U.S. at 78-79 (Powell, J., concurring).

repeated necessarily dampens the spontaneity and freedom of private conversation. *See Nixon v. Administrator of General Services,* 433 U.S. 425, 457 (1977).

Injury to privacy can be accomplished without the recording and transmission of the communication by means of electronic equipment. The simultaneous witnessing and recording of the communication by undisclosed listeners, however, has a powerful authenticating effect on the information improperly disclosed. The simultaneous transmission of private communications enables the consenting participant to corroborate what might otherwise be ignored by the unseen listeners as unfounded gossip. The recording of such communications enables both the seen and unseen listeners in turn to corroborate their injurious or improper disclosures to others. Every person's right to privacy necessarily embraces not only the interest in not having embarrassing facts publicized, but also the interest in not having them believed. That invasions of privacy may be committed without the aid of electronic eavesdropping equipment does not abate every citizen's interest in minimizing the believability and impact of information improperly disclosed.

Consideration of this interest in thwarting the communication of noncriminal but embarrassing information confirms that the privacy interests of persons other than proper suspects in criminal investigations are affected by electronic monitoring and eavesdropping. The effect of giving unlimited sanction to these investigative techniques is not merely to deprive a criminal of his ability to succeed in a perjurious rebuttal to a government agent's imperfect recollection. Rather, the injury is the uncontrolled availability of a dangerous instrument of injury to feelings and reputation. Consensual monitoring and eavesdropping require control because they threaten

> the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him. . . .

United States v. White, supra, 401 U.S. at 790 (Harlan, J., dissenting). *See generally United States v. King,* 478 F.2d 494, 505 (9th Cir. 1973), *cert. denied* 417 U.S. 920 (1974).

It is undisputed, of course, that every citizen may reasonably expect that his private conversations with other persons are not being overheard without at least the other person's consent. *Katz v. United States, supra.* Entirely apart from the privacy interests directly affected by consensual eavesdropping and monitoring, this expectation too would be threatened by an unlimited power in government agents to engage in these practices indiscriminately. The distinction between consensual and nonconsensual monitoring and eavesdropping has become more problematical with advances in electronic technology. *See United States v. Padilla,* 520 F.2d 526 (1st Cir. 1975). Decisions approving consensual electronic eavesdropping and monitoring without a judicial warrant have not been premised upon any assumption that the "consenting" party participated in the recorded conversation. The rationale of these decisions has been that by communicating with others, every citizen incurs the risk that his words may be repeated *by anyone within earshot.* The increasing sophistication of listening devices has complicated the question whether a particular auditor is "within earshot." The highly sensitive equipment presently used in surreptitious investigations makes it possible to overhear conversations beyond the range of normal human hearing without resorting to conventional "bugging" techniques, such as the planting of hidden microphones.

Subsequent review of a tape recording or transcript cannot verify whether the recorded conversation was or was not within the range of the ordinary human hearing of the person engaged in the transmitting or recording. In this class of cases, unlimited freedom to engage in "consensual" monitoring and eavesdropping would leave the protection against nonconsensual eavesdropping to be determined by a credibility contest over whether the government agent or informer was or was not "within earshot" of the speaker.

2. *Consensual electronic eavesdropping and monitoring call for the same measured restraints as other intrusions upon privacy.* Due process of law requires the government to do more than condemn, in a general, abstract way, improper investigative conduct by its agents. It must establish procedures to minimize the danger of such misconduct in the first instance. *See e.g., Miranda v. Arizona,* 384 U.S. 436, 467-68, 471-72 (1966). *See generally, Michigan v. Payne,* 412 U.S. 47, 52-53 (1973). Due process would have very little meaning if the government could satisfy its requirements merely by urging its agents to act judiciously, without taking any steps to assure obedience. *See Environmental Defense Fund, Inc. v. Ruckelshaus,* 439 F.2d 584, 598 (D.C. Cir. 1971).

In some circumstances the appropriate preventive measure is a restraint upon the discretion of enforcement-level agents to act without seeking a disinterested determination of the necessity for their actions.[8] *See, e.g., United*

8. Administrative agencies have an obligation to prevent abuses of decision-making authority by vesting responsibility in officials able to bring impartial, independent judgment to the decision. *See, e.g., Withrow v. Larkin,* 421 U.S. 35, 46-55 (1975); *Morrissey v. Brewer,* 408 U.S. 471, 485-86 (1972). *See generally Lee v. Macon County Board of Education,* 490 F.2d 458, 460 (5th Cir. 1974); *Bluth v. Laird,* 435 F.2d 1065, 1071-72 (4th Cir. 1970); *Relco, Inc. v. Consumer Product Safety Commission,* 391 F. Supp. 841, 845-46 (S.D. Tex. 1975).

States v. Giordano, 416 U.S. 505, 515-23 (1974); *United States v. King, supra,* 478 F.2d at 503-05. Prior approval is particularly appropriate for investigative techniques that threaten privacy because only rarely can the injury be redressed. The purpose of the requirement that searches and seizures be authorized in advance by an independent magistrate upon a showing of probable cause is to bring to bear upon important investigative decisions an impartial judgment that can be exercised only by officials who do not have a personal stake in the outcome of the investigation:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). This authorization procedure is required not only by the Fourth Amendment, but also as an element of due process of law. Indeed, it is only as an aspect of the fundamental requirements of due process that the warrant requirement binds the states. *Mapp v. Ohio,* 367 U.S. 643 (1961); *Wolf v. Colorado,* 338 U.S. 25 (1949), *overruled on other grourds,* 367 U.S. 655.[9]

9. The concept of due process is the same in the Fifth and Fourteenth Amendments. *See Bowles v. Willingham,* 321 U.S. 503, 518 (1944); *Lebowitz v. Forbes Leasing and Finance Corporation,* 326 F. Supp. 1335, 1354 (E.D. Pa. 1971), *aff'd* 456 F.2d 979 (3d Cir. 1972), *cert. denied* 409 U.S. 843 (1972). The Government's idea (Gov. Br. 27-31) that detrimental reliance by the defendant before the court is an essential ingredient in any and all due process claims ignores the fundamental implications of incorporation of the Fourth Amendment into the Fourteenth Amendment. A citizen can never rely to his detriment upon noncompliance with an

Nonconsensual electronic eavesdropping and monitoring must be supervised, constitutionally, through the oversight and authorization procedure embodied in the warrant requirement. *Katz v. United States, supra.* In *United States v. White, supra,* the Court sustained a conviction based on the testimony of government agents who, without prior judicial authorization, eavesdropped on conversations between the defendant and a government informant carrying a concealed radio transmitter. A plurality of the Court concluded that because the informant consented to this intrusion into his conversation with the defendant, the Fourth Amendment warrant requirement was inapplicable.[10] The most serious invasion of privacy occasioned by electronic eavesdropping occurs, of course, when neither party to the recorded conversation is aware of the eavesdropping. Finding no such intrusion, the plurality declined to require law enforcement agencies to observe the most stringent authorization and oversight procedure available under the Constitution—an application for a warrant, to be issued upon probable cause by a judicial officer. In *White,* however, the Court was not presented with the question whether less stringent oversight and authorization procedures might nevertheless be constitutionally required to satisfy either the reasonableness requirement of the Fourth Amendment or the Due Process Clause of the Fifth Amendment.[11] The defendant in *White* asserted neither the inadequacy of intra-executive procedures for supervising and controlling consensual electronic eavesdropping, nor any violation of whatever administratively developed procedures may have then governed the use of such techniques.

That the ultimate, most stringent form of authorization procedure—prior approval by a judicial officer upon a showing of probable cause—is not required for use of a particular investigative technique certainly does not establish that the technique may be used indiscriminately. Like all forms of due process, the requirement of reasonably

authorization requirement. There nevertheless can be no doubt that the due process clause of the Fourteenth Amendment accords to every citizen the right to the protection of prior judicial authorization before a search or seizure is conducted. Because the Government believes it has discovered probative evidence by means of the intrusions at issue in this case, it can perceive no "unfairness" to the defendant before the Court and thus no constitutional issue. This narrow view ignores the constitutionally protected interest of all citizens, who, but for constitutional restraints, would be exposed to the risk of intrusions into their privacy that yield no evidence of criminal activity. The due process clauses of the Fifth and Fourteenth Amendments provide protection far beyond the mere right not to be misled by government officials. *See, e.g., Williams v. Blount,* 314 F. Supp. 1356, 1363-64 (D.D.C. 1970).

10. Most of the lower federal courts have assumed that the rule set forth in the plurality opinion reflects the view of a majority of the Court. *See, e.g., Holmes v. Burr,* 486 F.2d 55, 58-59 (9th Cir. 1973), *cert. denied* 414 U.S. 1116 (1973), *and cases cited therein; Flemmi v. Gunter,* 410 F. Supp. 1361, 1368 n. 7 (D. Mass. 1976), *and cases cited therein.* That question need not be reached here, because this case is controlled by the measure of Fourth Amendment reasonableness and Fifth Amendment due process settled upon by the Justice Department and the IRS in administratively adopting the intra-executive warrant requirements at issue on this appeal. *See* pp. 35-38, *infra.*

11. The Fourth Amendment's proscription of "unreasonable" searches and seizures calls for the same balancing of governmental and personal interests the courts must undertake in interpreting the requirements of due process of law. *See, e.g., Marshall v. Barlow's, Inc., supra,* ..... U.S. ....., 56 L.Ed.2d at 313-17; *United States v. United States District Court, supra,* 407 U.S. at 314-15; *Berger v. New York, supra,* 388 U.S. at 53; *Terry v. Ohio,* 392 U.S. 1, 20-21 (1968); *Ker v. California,* 374 U.S. 23, 33 (1963). In Fourth Amendment cases, the personal value most explicitly considered is privacy; in due process cases, a broader range of interests is often implicated—including the fundamental interest of every citizen in the promulgation of and adherence to uniform, definite standards and procedures by those who enforce the law. The court of appeals specifically premised its decision on the Due Process Clause of the Fifth Amendment. The constitutional analysis is the same under either rubric. *See United States v. Stone,* 232 F. Supp. 396, 400 (N.D. Tex. 1964), *aff'd* 357 F.2d 257 (5th Cir. 1966).

specific standards and procedures varies according to the importance of the interests affected by governmental action. *Compare, e.g., United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), *with Smith v. Goguen, supra,* 415 U.S. at 573; *Edwards v. South Carolina,* 372 U.S. 229, 236 (1963). Due process is not a rigid set of rules that yields automatic answers. How much process may be due in a particular context can be determined only by consideration of the competing values involved:

> The analysis requires consideration of three distinct factors: "First, the private interest that will be affected . . .; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Ingraham v. Wright, 430 U.S. 651, 675 (1977) (quoting from *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)).

The courts have taken this flexible approach in assessing how much procedural protection is constitutionally required to assure that investigative techniques affecting privacy are not abused. Particularly in passing upon searches and seizures asserted by the Government to be reasonable, although warrantless, the courts have made it clear that the protection of privacy accorded by the Constitution is not an all-or-nothing proposition. *See United States v. Barbera,* 514 F.2d 294, 301-03 (2d Cir. 1975). Decisions concerning pat-downs and investigative stops, border searches, impounded auto inventories, administrative searches, and intrusions to gather intelligence against agents of foreign governments demonstrate that if an intrusion is moderate and is justified by compelling governmental interests, some form of protection less exacting than the requirement of a warrant issued upon probable cause may be sufficient.

In *Terry v. Ohio, supra,* the Court considered whether a limited search for weapons, carried out by patting down the outer clothing of a suspect, was reasonable despite the investigating officer's conceded lack of probable cause to arrest. The Court disapproved decisions that had tried to articulate technical and abstract definitions of "search" and "seizure":

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, an essential element in the analysis of reasonableness. [citations omitted]
>
> . . . We therefore reject the notion that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

392 U.S. at 18-19, n. 15. The Court concluded that, in light of the moderate and carefully limited scope of the search, the compelling need of police officers to protect themselves, and the investigating officer's reasonable basis for believing that his safety required a pat-down search for weapons, the search was reasonable. *See United States v. Powers,* 439 F.2d 373, 376 (4th Cir. 1971), *cert. denied,* 402 U.S. 1011 (1971).

The Court has made the same careful calibration in balancing the governmental and personal interests implicated in searches and seizures in border areas. In *United States*

v. Brignoni-Ponce, 422 U.S. 873 (1975), the Court concluded that, as in *Terry,* an investigative stop of an automobile within a reasonable distance from the border,[12] though warrantless, is reasonable under the Fourth Amendment if based upon a reasonable suspicion that the vehicle contains illegal aliens. The Court arrived at this standard by balancing the amply demonstrated governmental interests in such roving-patrol stops (for which the Court found no practical alternative) against the relatively moderate privacy interests impinged upon by a brief detention of automobile occupants. The intrusion embraced only a specific inquiry about citizenship and immigration status, in contrast to a full-scale arrest or intrusion into the privacy of a residence, accompanied by a broad-ranging interrogation on suspected criminal activity. Apparent Mexican ancestry, the Court concluded, does not provide sufficient reasonable suspicion to justify even this relatively mild intrusion. 422 U.S. at 878-81, 885-86.

In several decisions upholding such moderate intrusions despite the absence of a warrant, the Court has laid special emphasis on intra-executive controls limiting the discretion of enforcement-level agents. In *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), the Court upheld routine vehicle stops at fixed check-points near the border, irrespective of probable cause to arrest or a reasonable suspicion such as would justify an investigative stop. The governmental interests urged as justifying this investigative technique were essentially the same as those presented in *Brignoni-Ponce.* 428 U.S. at 556-57. The Court considered the intrusion occasioned by a stop at a fixed check-point objectively the same as the roving-patrol stop. It

12. The "reasonable distance" within which such searches and seizures were authorized by statute, 8 U.S.C. § 1357(a)(3), had been administratively refined to mean one hundred air miles from the border. 8 C.F.R. § 287.1(a) (1975).

nevertheless found two reasons for permitting routine stops at fixed check-points: all traffic was stopped at a clearly identified station bearing symbols of authority, rendering fixed check-points less threatening and frightening. Moreover, unlike roving-patrols, the use of such check-points did not permit indiscriminate intrusions by officers in the field, who might abuse an unreviewable discretion to stop travelers on the highway:

> [C]heck-point operations both appear to and actually involve less discretionary enforcement activity. . . . The location of a fixed check-point is not chosen by officers in the field, but by officers responsible for making overall decisions as to the most effective allocation of limited enforcement resources.

428 U.S. at 559.

One of the defendants in *Martinez-Fuerte* contended that check-point stops are permissible only if the agents have obtained a warrant, somewhat similar to the area warrants discussed in *Camara v. Municipal Court,* 387 U.S. 523 (1967), authorizing routine stops at the particular check-point location in question. The Court concluded that prior judicial authorization was not called for, in part, because "the need for this is reduced when the decision to 'seize' is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials." 428 U.S. at 566; *see United States v. Montgomery,* 561 F.2d 875, 883 (D.C. Cir. 1977).

The Court has also emphasized the importance of intra-executive controls limiting the discretion of law enforcement agents in upholding warrantless inventorying of the contents of impounded automobiles. In *South Dakota v. Opperman,* 428 U.S. 364 (1976), police inventoried the contents of a car impounded for parking violations. No

warrant was obtained for searching the car, including the glove compartment, in order to collect any valuables and store them for safekeeping. At the time of the inventory, the police did not suspect criminal activity. Referring to its decisions upholding warrantless searches of automobiles, the Court concluded that the search was reasonable despite the absence of probable cause. Repeatedly, the Court alluded to standard police procedures that limited the officers' discretion in searching impounded automobiles. 428 U.S. at 366, 369, 372, 376. The Court relied heavily upon *Cady v. Dombrowski,* 413 U.S. 433 (1973), observing that there it had "carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department, *ibid.,* a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." 428 U.S. at 374-75 (emphasis in original).[13] Mr. Justice Powell did not believe that inventory searches of impounded automobiles fell within the "automobile search" exception to the warrant requirement, since that exception is based upon the danger that an automobile will be removed before a warrant can be sought—a problem not presented with respect to impounded automobiles. He nevertheless concluded that prior judicial authorization for such searches is unnecessary because

13. The concurrence of Mr. Justice Powell, which was necessary to the judgment in *Opperman,* specifically relied upon this intra-executive safeguard:

> As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accordance with the regulations of the Vermillion Police Department. Upholding searches of this type provides no general license for the police to examine all of the contents of such automobiles.

428 U.S. at 380.

> [T]he officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.

428 U.S. at 383; *see United States v. Edwards,* 498 F.2d 496, 499-500 (2d Cir. 1974); *United States v. Spitalieri,* 391 F. Supp. 167, 169 (N.D. Ohio 1975).

Administrative searches provide yet another example of the Court's effort to tailor constitutional requirements by measuring the impact of a particular investigative technique on privacy and on the government's interest in effective law enforcement. In *Camara v. Municipal Court, supra,* the Court held that administrative searches of private dwellings by health inspectors, under the authority of local housing codes, are subject to the Fourth Amendment warrant requirement; but that the requirement of probable cause for such searches, commonly conducted as part of inspections of large areas targeted as likely to have health and housing problems, may be satisfied by meeting a less demanding standard of reasonableness. The issuance of a warrant for such searches is reasonable, the Court explained, if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538.[14] *Cf. United States v. Bradley,* 571 F.2d 787, 789-90 (4th Cir. 1978).

14. The use of administratively determined search standards has also been suggested as a substitute for conventional probable cause to conduct roving border patrol searches. *Almeida-Sanchez v. United States,* 413 U.S. 266, 275, 283-84 (1973) (Powell, J., concurring).

In several cases, the Government has contended that electronic eavesdropping against agents of foreign governments carried out under authority of the President's constitutional power to protect national security is not subject to the warrant requirement of the Fourth Amendment. Recognition of such an exception has generally been proposed on the understanding that such eavesdropping would be carefully controlled by requiring prior authorization by high officials in the executive branch. *See Katz v. United States*, *supra*, 389 U.S. at 363-64 (White, J., concurring); Electronic Surveillance within the U.S. for Foreign Intelligence Purposes: Hearings on S.3197, the Foreign Intelligence Surveillance Act of 1976, before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Committee on Intelligence, 94th Cong., 2d Sess. 37-40 (1976) (address by The Hon. Edward H. Levi) (Resp. App. at 6-14). *See generally, United States v. Ehrlichman*, 546 F.2d 910, 923-28 (D.C. Cir. 1976), *cert. denied* 429 U.S. 1120 (1977). These views are consistent with the practice of the Department of Justice, with isolated exceptions, over the past fifty years. Levi Address, *supra*, at 23-25. (Resp. App. at 1-5).[15] Even where judicial intervention is not required by the Constitution, it nevertheless is imperative that officials of the executive branch act judiciously in order to prevent abuses.

15. On January 24, 1978, the President issued an executive order restricting electronic surveillance in foreign intelligence cases. The order provides that in such investigations information is to be gathered by "the least intrusive means possible. . . ". Electronic surveillance is forbidden

> unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power.

Exec. Order No. 12036, § 2-201(a), (b) at 16, 43 Fed. Reg. 3674 at 3685 (1978).

The measured restraints adjudicated in these cases throw into high relief the extremity of the Government's position in this case. The ruling it seeks would confer upon any state or federal investigative agent an unlimited power surreptitiously to record and transmit simultaneously to any other persons, by means of electronic eavesdropping equipment, any statement of any citizen made within earshot of a government agent (whether identified or unidentified) or an informer cooperating with such an agent. Moreover, if the Court were to accept the Government's view of the right of privacy, this unlimited power would necessarily embrace the use of other monitoring and surveillance techniques. Investigative agents would be entitled to use surreptitiously placed radio transmitters (such as those attached to automobiles in the "beeper" cases discussed above) to monitor the whereabouts of any citizen, regardless of whether such monitoring served the legitimate needs of law enforcement. The indiscriminate use of electronic eavesdropping equipment holds the same potential for injury to the privacy of all citizens inherent in indiscriminate resort to weapons pat-downs by police officers, roving-patrol and fixed check-point stops by border patrol agents, automobile inventories by police impound personnel, and business inspections by regulatory agency investigators. The abuse-prone character of this particular investigative technique makes it the least likely candidate for the special exemption the Government seeks from its duty of self-restraint in this case.

B. The IRS Regulations Governing the Authorization of Electronic Eavesdropping Express the Response of the Executive Branch to the Requirements of Due Process.

The Internal Revenue Service regulations at issue in this case were developed to protect the important personal

interests of every citizen in personal privacy and uniform, consistent administration of the law. This conclusion is supported by the text of the regulations, the historical setting in which they were adopted, and the clear contrast between these rules and the diversity of less imperative regulations the courts have considered in other contexts.

The primary responsibility for investigating criminal violations of the federal tax laws lies with the Intelligence Division of the Internal Revenue Service (recently renamed the Criminal Investigations Division). The Internal Security Division of the IRS is chiefly concerned with investigating allegations against IRS personnel, but also has responsibility for investigating a narrow class of criminal allegations against taxpayers, including allegations of bribery. Paragraph 652 of the Internal Revenue Manual sets forth specific, mandatory procedures to be followed in every case in which electronic eavesdropping or monitoring is to be conducted. For eavesdropping or monitoring involving nontelephonic communications, the written approval of the Attorney General or his designee is to be sought forty-eight hours before the intrusion is to occur. Agents are directed to include in their requests for approval an explanation of the reasons justifying the proposed intrusion, the equipment to be used, the names of the persons involved, where the eavesdropping or monitoring is to occur and for how long, and the technical method by which the equipment will be installed. Internal Revenue Manual ¶ 652.22(2), (3). The regulations provide that electronic eavesdropping authorization will be granted only when, "in the considered judgment of the designated official, such action is warranted and necessary to effective law enforcement." Internal Revenue Manual ¶ 652.1(5). Approval is not to be granted unless the approving official "is fully

convinced that the investigation warrants the use of such techniques." Internal Revenue Manual ¶ 652.21(4). Within forty-eight hours after any intrusion, a follow-up report is to be prepared by the field office responsible for the investigation. The report is to be forwarded to the National Office of the Internal Revenue Service.

In an emergency, the authorization normally to be sought from the Attorney General may be given by the Director or Acting Director of the Internal Security Division of the IRS, or by the Assistant Commissioner of the IRS for Inspection. These officials are forbidden to delegate their power of approval. Internal Revenue Manual ¶ 652.22(6). When emergency approval is granted by these officials, the field office is to complete and transmit to the National Office of the IRS by telecopier the written request for authorization used in non-emergency cases. This report is to be transmitted immediately and is to include an affidavit from the enforcement-level employee directly involved in the electronic eavesdropping or monitoring and "*an explanation of the specific conditions that precluded obtaining advanced approval. . . .*" Internal Revenue Manual ¶ 652.22(6) (emphasis in original). To assure that the obligations of field personnel are spelled out with the utmost clarity, the IRS has designed printed forms on which requests for authorization and follow-up reports are to be submitted. Internal Revenue Manual ¶¶ 652.21, 652.22.

The regulations also provide for strict control over access to electronic eavesdropping equipment. In each regional office, the equipment is to be stored in a central, locked facility. An equipment custodian is to be designated by the Regional Inspector. Access to the equipment is to be limited to the top officials of each regional office and the custodian.

Each piece of electronic eavesdropping equipment maintained at any field office is to be described on a separate entry card in a record system accounting for all equipment at that location. Special forms are provided for recording the movement of any equipment in and out of locked storage. These forms include information concerning the specific investigation in which the equipment has been used (case title and number), the date the equipment was returned, and a list of the dates on which the equipment was used. These forms are to be forwarded to the Regional Inspector and filed along with the request forms on which authorization for the electronic eavesdropping in question was sought. Each equipment custodian is to submit an annual report detailing the inventory of electronic eavesdropping equipment on hand at the particular field office. These annual reports are to be submitted to the National Office of the Internal Revenue Service to be used by the Assistant Commissioner of Inspection in preparing his annual report to the Assistant Attorney General for the Criminal Division. That report is to describe the IRS's current inventory of electronic eavesdropping equipment and narrate briefly the results of the agency's electronic eavesdropping activities during the preceding year. Internal Revenue Manual ¶ 652.4(1)-(7) (Resp. App. at 18-20).

This detailed system of controls on the use of electronic eavesdropping equipment is not confined to the Internal Security Division of the IRS. Special Agents in the Criminal Investigations Division are subject to virtually identical restraints. Internal Revenue Manual ¶¶ 9389.1-9389.9. The regulations for both divisions recite that they implement Internal Revenue Service policy on electronic eavesdropping, as set forth in Policy Statement P-9-35. In implementing that Policy Statement (*See* IRS Manual Supplement dated April 11, 1974, Resp. App. at 15-17) the

IRS underscored what is manifestly apparent from the very structure of the regulations—that these procedures are designed to prevent invasions of privacy and arbitrary, capricious conduct by field personnel:

> The monitoring of conversations with the consent of one of the participants is an effective and reliable technique but must be sparingly and carefully used. The Department of Justice has encouraged its use by criminal investigators where it is both appropriate and necessary to establish a criminal offense. *While such monitoring is constitutionally and statutorially permissible, this investigative technique is subject to careful regulation in order to avoid any abuse or unwarranted invasion of privacy.*

(emphasis added); *see* Internal Revenue Manual ¶ 9389.1 (5).

These regulations were promulgated a number of years before the 1972 Justice Department Memorandum cited by the Government (Gov. Br. at 21). They grew out of a series of alarming revelations of widespread abuses of investigative authority by the Internal Revenue Service and other federal agencies in 1965. Most of the abuses were discovered in the course of hearings held by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary. The subcommittee surveyed the investigative techniques of a number of federal agencies, and particularly their use of electronic equipment. *Invasions of Privacy (Government Agencies): Hearings Pursuant to S. Res. 39 Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Senate,* 89th Cong., 1st Sess. 1-12 (1965) ("S.Res. 39 Hearings") These hearings revealed indiscriminate and often unlawful use of various sensitive investigative techniques, including wiretapping, surveillance, bugging, electronic eavesdropping, and improper seizure and opening of

personal first class mail, by the field personnel of many federal agencies. S.Res. 39 Hearings, *supra*, at 345-49 (Part 2), 364-86 (Part 2), 1130-31 (Part 3), 1645-46 (Part 4), 1945-53 (Part 4), 1834-37 (Part 4); *Right of Privacy Act of 1967: Hearings Pursuant to S.Res. 25 on S. 928 Before The Subcomm. on Administrative Practice and Procedure of The Comm. on The Judiciary of the U.S. Senate*, 90th Cong., 1st Sess., 15, 16, 29 ("S. 928 Hearings"). Investigative personnel of the Internal Revenue Service were among the worst offenders. The indiscriminate use of a wide variety of electronic eavesdropping equipment was found to be common in a number of Internal Revenue Service regional offices. *See* S. Res. 39 Hearings, *supra*, at 1518-26 (Part 3), 1531-34 (Part 3), 1548-56 (Part 3), 1740-49 (Part 4), 1762-63 (Part 4), 1775-77 (Part 4), 1828-30 (Part 4), 1923-35 (Part 4), 1999-2003 (Part 4), 2021-30 (Part 4), 2055-58 (Part 4); S. 928 Hearings, *supra*, at 1133-44, 1155-56, 1199-1203. The agency had been conducting a special school to train its agents in questionable and even unlawful uses of investigative techniques. S.Res. 39 Hearings, *supra*, at 1512-17 (Part 3), 1730-33 (Part 4), 2016-17 (Part 4), 2030-44 (Part 4). Among the complaints considered by the subcommittee was routine eavesdropping on meetings and telephone conversations between Revenue Agents and taxpayers. S. 928 Hearings, *supra*, at 15, 16, 29. Supervisory personnel were aware of the widespread use of electronic eavesdropping equipment and condoned it. S.Res. 39 Hearings, *supra*, at 1546-47 (Part 3). The Commissioner of Internal Revenue candidly admitted to the subcommittee that the frequency and flagrancy of improper investigative activity by field personnel had gone undetected by high officials within the agency and that the agency had failed to take steps to control such activity. *Id.*, at 1118, 1124 (Part 3).

Reacting to these revelations, President Johnson issued a directive to all executive agencies on June 30, 1965 forbidding wiretapping and electronic eavesdropping, except in cases involving national security. *See United States v. White, supra*, 401 U.S. at 767 (Appendix II to Opinion of Douglas, J., dissenting). This order was a direct response to the abuses of investigative authority within the Internal Revenue Service discovered during the hearings. New York Times, Friday, July 16, 1965. The President commissioned an exhaustive study of the use of electronic eavesdropping techniques by federal agencies. S.Res. 39 Hearings, *supra*, at 1130 (Part 3); N. Y. Times, August 29, 1965, at 6, col. 3; N. Y. Times, July 7, 1967, at 1, col. 1.

In July 1965, the Internal Revenue Service convened a special inquiry board to investigate electronic eavesdropping practices within the agency over the preceding eight years. S.Res. 39 Hearings, *supra*, at 1126, 1142; Stand. Fed. Tax Rep. (CCH) ¶ 6711 (1967) (Resp. App. at 21). The Commissioner of Internal Revenue sent telegrams to each district office instructing field personnel to compile a history of all known instances of wiretapping, bugging, and other electronic eavesdropping and monitoring, both consensual and nonconsensual. S. 928 Hearings, *supra*, at 30-32. The Commissioner promised the Administrative Practices Subcommittee a full accounting of the abuses within the agency. S.Res. 39 Hearings, *supra*, at 1144: Stand. Fed. Tax Rep. (CCH) ¶ 6711 at 71,754 (1967) (Resp. App. at 21). In July 1967, the Internal Revenue Service issued a press release (News Release No. 890), summarizing its report to the subcommittee, which the Commissioner had transmitted in the form of a letter and supporting exhibits. Stand. Fed. Tax Rep. (CCH) ¶ 6711 (1967). The letter and press release also announced the adoption, upon the recommendation of the special inquiry board convened

in July 1965, of procedures to prevent improper electronic eavesdropping and monitoring. After reviewing the extent of the problem, the Commissioner stated:

> To correct the situation, I issued unmistakeably clear and detailed proscriptions on investigative techniques and set forth the Service's policy in drastic and unmistakeable terms. Steps have also been taken to bring all facets of our investigative activity under the Service's normal National Office, Regional Office and District Office system of direction and control.

Stand. Fed. Tax Rep. (CCH) ¶ 6711 at 71,755 (1967) (Resp. App. at 27).

At the same time, the Attorney General acted upon the results of the two-year study of electronic eavesdropping commissioned by the President in June 1965. N. Y. Times, July 7, 1967, at 1, col. 1. The Department of Justice circulated a memorandum on electronic eavesdropping to all federal agencies directing the development of agency regulations substantially similar to those adopted by the Internal Revenue Service. *Id.;* N. Y. Times, August 26, 1967, at 13, col. 1. The basic guidelines set forth in that memorandum have been carried forward through the successive presidential administrations, and the Justice Department memorandum has been reissued in essentially the same form by later Attorneys General. The Internal Revenue Service regulations announced in July 1967 have remained substantially unchanged in the last eleven years.

It is thus abundantly clear that these regulations were promulgated to protect important personal interests.[16] A

16. Indeed the Government has taken the position that Army regulations similar to these IRS regulations provide sufficient protection of personal privacy to justify dispensing with the warrant requirement in cases of electronic surveillance against American citizens residing abroad. *Berlin Democratic Club v. Rumsfeld,* 410 F. Supp. 144, 159 (D.D.C. 1976).

substantial body of decisions evaluating a wide variety of administrative regulations has made plain the distinction in judicial enforceability between regulations designed to protect important personal interests, such a privacy, and regulations merely designed to improve an agency's "housekeeping." *Compare Morton v. Ruiz, supra,* 415 U.S. at 235; *Bridges v. Wixon,* 326 U.S. 135, 152-54 (1945); *United States v. Sourapas,* 515 F.2d 295 (9th Cir. 1975); *United States v. Leahey,* 434 F.2d 7 (1st Cir. 1970); *United States v. Heffner,* 420 F.2d 809 (4th Cir. 1969); *United States v. Coleman,* 478 F.2d 1371, 1374 (9th Cir. 1973); *with Lyman v. United States,* 500 F.2d 1394 (Temp. Emerg. Ct. App. 1974); *United States v. Bunch,* 399 F. Supp. 1156, 1162 n. 5 (D. Md. 1975), *aff'd* 542 F.2d 629 (4th Cir. 1976); *Van Teslaar v. Bender,* 365 F. Supp. 1007, 1010 (D. Md. 1973). *See generally, American Farm Lines v. Black Ball Freight,* 397 U.S. 532, 538-39 (1970).

United States v. Mapp, 561 F.2d 685, 690 (7th Cir. 1977) illustrates the contrast. There a defendant sought exclusion of statements made to an IRS Revenue Agent at a point in an investigation when, according to a section of the Internal Revenue Service Audit Technique Handbook, a referral should have been made to the Intelligence Division because the discovery of evidence of fraud required a Special Agent "to evaluate the criminal potential of the case and decide whether a joint investigation should be initiated." The purpose of the regulation is to ensure expert input on potential criminal cases, rather than to protect individual rights. Accordingly, the court refused to suppress the evidence. *See United States v. Lockyer,* 448 F.2d 417, 419-22 (10th Cir. 1971); *United States v. Goldstein,* 342 F.

Supp. 661, 668 (E.D.N.Y. 1972). *See generally, Rosenberg v. C.I.R.*, 450 F.2d 529, 532-33 (10th Cir. 1971).[17]

Rinaldi v. United States, 434 U.S. 22 (1977) certainly does not suggest a different perception of the distinction between housekeeping rules and rules designed to protect important personal interests. There a federal conviction was obtained on the basis of the same robbery offense of which the defendant had been convicted in State Court. The United States Attorney prosecuting the case proceeded with the trial despite the well-established policy of the Department of Justice against initiating federal prosecutions arising out of the same facts on which a state conviction has been obtained. The Department has required that departures from this general policy be authorized only upon "compelling reasons," as judged by an Assistant Attorney General. 434 U.S. at 24 & n. 5. In *Rinaldi*, the Government sought to set aside the conviction on the ground that this procedure had not been followed. Because the Government's motion to dismiss the indictment was

17. The Government cites *Sullivan v. United States*, 348 U.S. 170 (1954) as an example of a "housekeeping" regulation. The purpose of the regulation at issue there bears no resemblance to the purpose of the regulations in this case. In *Sullivan* the defendant sought to overturn his conviction on the ground that it resulted from an indictment returned on the basis of evidence purportedly presented to the grand jury by the district attorney without proper authorization by the Office of the Attorney General. At issue were an Executive Order and Department of Justice Circular Letter requiring approval from the Attorney General's office before the presentation of evidence to the grand jury concerning violations of federal revenue laws. These directives paralleled a statutory restriction, 26 U.S.C. § 3740, against the initiation of civil tax proceedings by the United States Attorney without the authorization of both the Attorney General and the Commissioner of Internal Revenue. The apparent purpose of these restraints was to assure that decisions to enforce the tax laws would be informed by a judgment as to the impact of a judicial decision on overall tax policy. Moreover, the Court concluded that the Executive Order and Circular Letter could not be read as a curtailment of "the well-recognized power of the Grand Jury to consider and investigate any alleged crime within its jurisdiction." 348 U.S. at 173.

not made until after the trial, and because the United States Attorney had acted in bad faith in informing the court that the Department had authorized the prosecution, the district court declined to set aside the conviction. Both the Government and the defendant appealed from that denial, and this Court ultimately overturned the conviction.[18]

The policy at issue in *Rinaldi* is designed to accord defendants the same protection against unfairness provided by the Double Jeopardy Clause and the Due Process Clause. The need to enforce the policy over the Department's protest, however, never arises. If, even after conviction, a defendant complains of lack of proper authorization for a duplicative prosecution, the Department can remedy the violation as it did in *Rinaldi*. The authorization procedures at issue in this case, in contrast, are in part for the protection of persons not before the court—the taxpayers against whom unauthorized, improper electronic eavesdropping is

18. The Government infers (Gov. Br. at 25 & n. 7) that the Court's enforcement of the policy against duplicative prosecutions at the instance of the Government demonstrates that the policy would not be enforced over the Government's objection, and a number of Circuit Court decisions are cited in support of this view. In these decisions, however, the defendant was necessarily challenging the Department's findings of "compelling reasons", made either before or after the trial, justifying an exception to its usual policy against duplicative prosecutions. The policy requires an Assistant Attorney General to exercise discretion—to find "compelling reasons"—before making an exception. By hypothesis, such discretion has been exercised in every case where the Department of Justice asserts the appropriateness of a second prosecution, either before trial or in the appellate courts. The Circuit Court decisions cited by the Government thus would appear to say no more than that such exercises of discretion are not judicially reviewable—as is no doubt true of decisions of an Assistant Attorney General to grant a request for authorizations submitted pursuant to the Internal Revenue Service's regulations on electronic eavesdropping.

conducted without any eventual criminal proceedings. The harm inflicted by these intrusions cannot be undone after the fact.

The procedures at issue here are also easily distinguishable from merely directory declarations of an agency's policies and goals. *Cf. United States v. Walden,* 490 F.2d 372, 376-77 (4th Cir. 1974); *United States v. Reeb,* 433 F.2d 381, 384 (9th Cir. 1970); *Smith v. United States,* 478 F.2d 398, 400 (5th Cir. 1973); *Rosenberg v. C.I.R., supra,* 450 F.2d at 532-33. The agency has consciously chosen to expend the resources and effort necessary to carry out stringent protective measures in every case—without exception. It has decided that mandatory procedures, rather than mere precatory guidelines or policy statements, are consistent with both its law enforcement mission and its obligation, entirely independent of judicial compulsion, to respect and uphold the constitutional rights of those it investigates. To assure that its judgment is carried out, it has spelled out with the greatest clarity and simplicity each step that its agents must take, and it has enjoined them in the sternest possible terms against relaxing their compliance with these commands.

C. Due Process of Law Requires That Regulations Promulgated by the Executive Branch Be Obeyed by Agents of the Government Unless and Until Changed.

As demonstrated above, due process of law requires the promulgation of standards and procedures to govern the conduct of investigative agents, and in this case the Executive Branch has responded to that requirement by developing administrative regulations providing authorization and oversight procedures governing the use of electronic eavesdropping equipment. It is undisputed that the procedures were disregarded in this case. Under these circumstances,

the Government has failed to meet the requirements of due process of law. The due process requirement that standards and procedures be developed to prevent arbitrary exercises of authority would provide scant protection if, after higher officials of an agency have made rules, investigative agents could disregard them.

This Court has consistently held that regulations promulgated by administrative agencies to protect important personal interests have the force and effect of law. So long as they remain in effect, they must be obeyed by agents of the government as well as by private citizens. *United States v. Nixon,* 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz, supra,* 415 U.S. at 235; *Yellin v. United States,* 374 U.S. 109 (1963); *Vitarelli v. Seaton,* 359 U.S. 535 (1959); *Service v. Dulles,* 354 U.S. 363 (1957); *Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *Bridges v. Wixon, supra,* 326 U.S. at 150-53. This fundamental principle is generally regarded as originating in the *Accardi* case, in which the Court overturned the denial of a writ of habeas corpus by a deportee attacking the denial of his application for suspension of deportation.

The principle announced in *Accardi* has become "a settled rule that has been enforced in a wide variety of contexts." *Checkman v. Laird,* 469 F.2d 773, 780 (2d Cir. 1972). Federal agencies have been held to their regulations on matters of the utmost sensitivity. *Accardi* itself involved a regulation governing immigration, a subject over which the federal government has always had plenary power. *See Kleindienst v. Mandel,* 408 U.S. 753, 765-67 (1972). Violation of agency procedures has been the basis for reversing discharge of government employees on grounds of national security. *Vitarelli v. Seaton, supra; Service v. Dulles, supra.* Although

Congress has absolute discretion in choosing its rules of operation, *see United States v. Ballin*, 144 U.S. 1, 5 (1892), even instrumentalities of the legislative branch have been held bound by their own rules. *Yellin v. United States, supra. See generally United States v. Nixon, supra,* 418 U.S. at 694-96. Although the role of the courts in reviewing administrative action by the armed forces has always been narrowly limited, *see Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), even military regulations "once issued must be followed scrupulously." *United States ex rel. Brooks v. Clifford*, 409 F.2d 700, 706 (4th Cir. 1969); *see Sanger v. Seamans*, 507 F.2d 814, 817 (9th Cir. 1974).

Accardi itself did not explicitly rest upon a constitutional basis. *See Board of Curators, Univ. of Mo. v. Horowitz*, ... U.S. ....., 55 L. Ed. 2d 124, 136 n. 8 (1978). That there is a due process aspect, however, to the principle announced in *Accardi* is clear: "some compliance with previously established rules—particularly rules providing procedural safeguards—is constitutionally required before the State or one of its agencies may deprive a citizen of a valuable liberty or property interest." *Id.*, 55 L. Ed. 2d at 146 n. 22 (Marshall, J., dissenting). This observation is supported by judicial decisions both before and after *Accardi*. In describing the Attorney General's deportation regulations as having the force and effect of law, the *Accardi* Court relied on *Bridges v. Wixon, supra*. In that case the Court overturned a deportation order because the deportation investigation had been conducted in violation of agency regulations requiring that statements secured from any person during the investigation be transcribed and signed under oath by the witness interviewed. The Court held that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." 326 U.S. at 153. It observed that the

investigative rules were "designed as safeguards against essentially unfair procedures" and were designed "to protect interests of the alien and to afford him due process of law." 326 U.S. at 152, 153, 154.[19]

Nearly every federal decision since *Accardi* that has addressed the issue has concluded that the principle announced in that case is grounded not only in federal administrative law, but also in the Due Process Clause of the Fifth Amendment. As Judge McCree observed in *Antonuk v. United States*, 445 F.2d 592, 595 (6th Cir. 1971), citing *Accardi*, "violation by the military of its own regulations constitutes a violation of an individual's right to due process of law [citations omitted]."[20]

Requiring the government to obey its own rules is not judicial interference in law enforcement, but rather the exercise of restraint to avoid difficult issues that need not

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19. The Government contends, as it did in *United States v. Leahey, supra*, 434 F.2d at 9, that the *Accardi* doctrine applies only in adjudicative contexts. The very case on which *Accardi* itself was premised, however, involved restrictions on the gathering of evidence in connection with deportation investigations. *Bridges v. Wixon, supra*, 326 U.S. at 150-53.

20. *See Konn v. Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972); *Like v. Carter*, 448 F.2d 798, 803 (8th Cir. 1971); *Hollingsworth v. Balcom*, 441 F.2d 419, 421 (6th Cir. 1971); *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970); *United States v. Leahey, supra*, 434 F.2d at 8-9 (1st Cir. 1970); *United States v. Lloyd*, 431 F.2d 160, 171 (9th Cir. 1970); *Government of Canal Zone v. Brooks*, 427 F.2d 346, 347 (5th Cir. 1970); *United States v. Heffner, supra*, 420 F.2d at 811-12 (4th Cir. 1969); *Whiteside v. Kay*, 446 F. Supp. 716, 719 (W.D. La. 1978); *Hupart v. Bd. of Higher Ed. of City of New York*, 420 F. Supp. 1087, 1107 (S.D.N.Y. 1976); *Coomes v. Adkinson*, 414 F. Supp. 975, 995-96 (D.S.D. 1976); *Myers v. Parkinson*, 398 F. Supp. 727, 730 (E.D. Wis. 1975); *Stokes v. Lecce*, 384 F. Supp. 1039, 1048-49 (E.D. Pa. 1974); *United States v. Capra*, 372 F. Supp. 609, 611-12 (S.D.N.Y. 1974); *Berends v. Butz*, 357 F. Supp. 143, 151 (D. Minn. 1973); *Otero v. New York City Housing Authority*, 344 F. Supp. 737, 745 & n. 13 (S.D.N.Y. 1972); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F.Supp. 602, 606 (D. Minn. 1972). *Contra, Bates v. Sponberg*, 547 F.2d 325, 330 (6th Cir. 1976).

be reached to render a decision. Absent the benefit of any administratively or legislatively developed standards, the courts must come to their own judgments of how much process is due under the circumstances presented. As noted above, that judgment must be based upon a delicate and difficult balancing of individual and governmental interests. *See United States v. Perez*, 440 F. Supp. 272, 279-80 (N.D. Ohio 1977), *aff'd* 571 F.2d 584 (6th Cir. 1978), *cert. denied* 56 L.Ed.2d 88 (1978). The same judgment is required where procedural protections developed legislatively or administratively are attacked as constitutionally insufficient. Where the government has adopted procedural protections, however, and its agents have failed to obey such commands, the difficult task of judicially balancing the interests is unnecessary. Whatever judgment the court might reach in weighing the competing considerations on its own is pre-empted by the judgment of the agency. It has decided how much process is due and presumably has balanced the interests of those affected by its action and the interests represented by its own law enforcement mission in the course of coming to its own judgment. Under these circumstances, as Judge McCree noted in overturning a violation of military regulations, "the due process clause here requires us not to measure the army regulations against some constitutional standard, but instead to determine whether the regulations were followed." *Antonuk v. United States, supra*, 445 F.2d at 595. *See generally Like v. Carter, supra*, 448 F.2d at 804. The imposition of judicial notions of proper investigative practice upon law enforcement agencies critized by the Government (Gov. Br. at 18-19) is not a danger in such cases. *Cf. Miranda v. Arizona, supra*, 384 U.S. at 490.

The Court has exercised this deference to the government's evaluation of how much process is due in the context

of a Fourth Amendment challenge to an administrative search. In *Colonnade Corp. v. United States*, 397 U.S. 72 (1970), agents of the Internal Revenue Service sought permission to inspect a locked liquor storeroom in order to investigate possible violations of the federal excise tax law. On being refused, and without any prior judicial authorization, one of the agents broke the lock and entered the storeroom. The proprietor brought an independent action for recovery of seized property and for suppression of such property as evidence. The authority of the agents to conduct inspections derived from 26 U.S.C. §§ 5146(b), 7606. Refusals by retail liquor dealers to permit such inspections were punishable by a five hundred dollar forfeiture, 26 U.S.C. § 7342.

The Court concluded that the unusually intense degree of governmental supervision of the liquor industry justified an exception to the warrant requirement. It nevertheless held that Congress had struck its own balance in deciding what investigative techniques were reasonable under these laws; and that the balance thus struck was binding upon the agents:

> As respects [the liquor] industry, and its various branches including retailers, Congress had broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

397 U.S. at 77.

The same reasoning has been applied to administrative regulations. In *Marshall v. Barlow's Inc., supra*, a Labor

Department inspector attempted a routine but warrantless search of the business premises of an employer subject to the requirements of the Occupational Safety and Health Act ("OSHA"). Although the Act authorized such searches, 29 U.S.C. § 657(a) (1970), the employer refused to permit the inspection on Fourth Amendment grounds. The Government argued that warrantless searches under OSHA were reasonable, and thus not violative of the Fourth Amendment, because of the limitations on search discretion established in the Act and applicable regulations. In rejecting the Secretary's contention that compliance with the warrant requirement would unduly hamper the agency in carrying out its law enforcement mission, the Court noted that the agency's own previous judgment, as expressed in its regulations, contradicted this assertion. The Secretary of Labor had promulgated regulations providing that inspectors refused entry by employers were to set in motion the steps needed to resort to judicial process to compel access for an inspection:

> The regulation represents a choice to proceed by process where entry is refused; and on the basis of evidence available from present practice, the Act's effectiveness has not been crippled by [this procedure].

56 L.Ed.2d at 314-15. The agency had already expressed its judgment that resort to judicial process would not unduly hamper its mission by changing its operating manual to require compulsory process where an employer has refused entry. 56 L.Ed.2d at 315 & n. 13. The Court took the agency at its word:

> If this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it.

Id.; see Mogavero v. McLucas, 543 F.2d 1081, 1084-85 (4th Cir. 1976); *Randolph v. Willis*, 220 F. Supp. 355, 358 (S.D. Cal. 1963).[21]

Effectuation of a law enforcement agency's judgment of how much process is due does not always benefit those against whom the agency has moved. Where an agency has promulgated standards and procedures in discharging its obligation to fulfill the requirements of due process of law, the courts must give considerable weight to the particular balance of governmental and individual interests struck by the agency. *See United States v. Watson*, 423 U.S. 411, 414-16 (1976); *Morales v. Schmidt*, 494 F.2d 85, 87-88 (7th Cir. 1974) (Stevens, J., concurring); *United States v. Perry*, 449 F.2d 1026, 1037 (D.C. Cir. 1971). Although the court might have found a different accommodation of these interests appropriate—perhaps one more onerous to the government—the agency's greater familiarity with the problems peculiar to its own enforcement mission calls for judicial deference. There is no sound reason for making this deference a one-way street—a presumption that the Government may invoke or abjure according to its own convenience.

We do not understand the Government to contend that the procedures embodied in the IRS regulations would not be binding upon the agency even if enacted by Congress. *See Colonnade Corp. v. United States, supra.* Rather, the Government asserts (Gov. Br. at 34, 35 & nn. 19, 20) that

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21. Even where the agency in question has not adopted investigative regulations, the Court has employed essentially the same analysis by consulting the rules and law enforcement experience of similar agencies. In adopting the safeguards announced in *Miranda v. Arizona, supra*, for example, the Court laid great emphasis upon the fact that the same procedures had been followed by the Federal Bureau of Investigation for many years without undue burdens upon its law inforcement mission. 384 U.S. at 483-86.

administrative regulations are not to be given the same effect as laws passed by the legislature. This reasoning simplistically assumes that differences in the abstract stature of two governmental bodies necessarily yield differences in the import of the power they exercise. It is precisely this equation that the *Accardi* doctrine nullifies. In every relevant aspect, exercises of legislative rule-making power by administrative agencies have the same force and effect as enactments of Congress.

To those from the Government commands obedience, it is plainly immaterial whether the sovereign command is expressed by an agency or a legislature. Even criminal sanctions may be imposed for violating an administratively developed standard promulgated to give specific content to a broad enactment of Congress. *See, e.g., United States v. Grimaud*, 220 U.S. 506, 515-17, 520-21 (1911). In such cases, the law regards the legislature authorizing the administrative standard, rather than the agency itself, as the source of infliction of criminal punishment. The decisions condemning vagueness and standardless enforcement of the law in both legislative and administrative rules[22] demonstrate that the obligations of the government, like the obligations of private citizens, do not vary according to whether a law is legislatively or administratively derived. Accommodations between federal law and state law under the Supremacy Clause are arrived at in the same fashion irrespective of whether the potentially conflicting laws result from exercises of legislative or administrative power.

22. *E.g., G.M. Leasing Corp. v. United States*, 429 U.S. 338, 356-57 (1977); *Soglin v. Kauffman*, 418 F.2d 163, 167-68 (7th Cir. 1969); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 264-65 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1139-40 (D.N.H. 1976). *See* pp. 10-12, *supra*.

See, e.g., 515 Associates v. City of Newark, 424 F. Supp. 984, 992 (D.N.J. 1977).

In exercising their powers of constitutional review, the courts invariably evaluate the challenged law in the light of administrative refinements corrective of constitutional defects in the legislation itself. In *California Bankers Assn. v. Shultz, supra*, for example, the Court considered whether the record-keeping requirements of the Bank Secrecy Act violated the Fourth and Fifth Amendments. The concurrences of Justices Powell and Blackmun, which were necessary to the judgment of the Court, rested squarely upon the narrowing effect of the implementing regulations. 416 U.S. at 78-79; *see United States v. Miller*, 425 U.S. 435, 444-45 n. 6 (1976). It is fair to say that Congress has delegated rule-making power to administrative agencies to take advantage of the possibilities for a more flexible response to the wide variety of circumstances addressed by government regulation and law enforcement. The legislature should not be made to choose between the flexibility of administrative standards and the desirability of carrying out its purposes through enactments that carry the force and effect of law. To deny administrative rules this force and effect is, ultimately, to frustrate Congress's effort to avail itself of this flexibility by delegations of rule-making power to administrative agencies.

The Government's suggestion that the Court regard administrative rules less seriously than legislative enactments is particularly inappropriate with respect to the IRS regulations at issue here, because it is apparent that the regulations were adopted to stand in the place of Congressional action. When the Internal Revenue Service adopted these regulations in 1967, Congress was investigating the need for legislation to curtail the use of electronic eavesdropping

equipment. In reporting to Congress on the development of the regulations, the Commissioner of Internal Revenue expressed his expectation that the Congress would consider the new procedures in evaluating whether legislation was necessary. Stand. Fed. Tax Rep. CCH ¶ 6711 at 71,757 (1967) (Resp. App. at 28); S.Res. 39 Hearings, *supra,* at 1124 (Part 3). The Omnibus Crime Control & Safe Streets Act of 1968 followed closely upon the announcement of the Internal Revenue Service regulations and the broader scheme of Justice Department control over electronic eavesdropping by various federal agencies. Even after the passage of the 1968 Act, interest in more restrictive measures to control electronic eavesdropping persisted. Weekly Comp. of Pres. Doc., June 24, 1968 at 982-83. Against the background of proposals to outlaw consensual eavesdropping without either a judicial warrant or the consent of *all* the parties to a communication,[23] the Internal Revenue Service has continued to take the position that its regulations obviate the need for legislative action. Oversight Hearings into the Operations of the IRS: Hearings Before a Subcomm. of the House Comm. on Government Operations, 94th Cong., 1st Sess. 401, 448-50, 455 (1975) ("IRS Government Operations Hearings"). *See generally Morton v. Ruiz, supra,* 415 U.S. at 213-29; *Service v. Dulles, supra,* 354 U.S. at 377-78.

II. EXCLUSION OF THE UNLAWFULLY ACQUIRED RECORDINGS IS THE APPROPRIATE REMEDY FOR THE AGENTS' DISREGARD FOR THE REQUIREMENTS OF DUE PROCESS.

The courts below correctly applied exclusionary sanctions in this case. Their rulings fully respect this Court's increas-

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23 *See* H.R. 10008, 93d Cong., 1st Sess. (1973); H.R. 9698, 93d Cong., 1st Sess. (1973); H.R. 9667, 93d Cong., 1st Sess. (1973).

ing emphasis on the need for assuring that particular applications of the exclusionary principle serve the deterrent purpose of the rule. The Government's assertion that the circumstances of this case call for an exception from generally applicable exclusionary doctrines is premised on both unwarranted alarm at the possibility of withdrawal of administrative safeguards and a view of the facts carefully considered and rejected by the courts below.

A. Exclusion of Evidence Acquired in Violation of the Requirements of Administratively Determined Due Process Serves the Deterrent Purpose of the Exclusionary Rule.

Exclusion of evidence in federal criminal trials has been considered the appropriate judicial response to violations of constitutional rights by law enforcement officers for many decades. *Brown v. Illinois,* 422 U.S. 590, 599 (1975); *Weeks v. United States,* 232 U.S. 383 (1914). The impossibility of redressing constitutional injury after the fact, particularly the injury to privacy presented in search and seizure cases, has obliged the courts to rely upon exclusion of evidence as a means of preventing such injury from occurring in the first place. Thus the chief purpose of the exclusionary rule is to protect constitutional and other rights by deterring violations of such rights. *United States v. Calandra,* 414 U.S. 338, 347 (1974); *see United States v. Peltier,* 422 U.S. 531, 536-39 (1975). It is designed to prevent future violations by impressing upon law enforcement officers that unlawful conduct will not be rewarded. *United States v. Janis,* 428 U.S. 433, 446 (1976).

Because the ultimate objective of investigations that have the potential for intrusions against privacy generally is a judgment of conviction, the courts have expected that "the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." *Stone v. Powell,*

428 U.S. 465, 492 (1976). In decisions refining the scope of the rule over many years, this Court has repeatedly affirmed its confidence in the deterrent value of the basic exclusionary principle. *See Franks v. Delaware*, ... U.S. ...., 57 L.Ed. 2d 667, 681-82 (1978); *Terry v. Ohio, supra,* 392 U.S. at 12; *Elkins v. United States, supra,* 364 U.S. at 217. Although the courts' reluctance to give judicial sanction to unlawful conduct has also continued to influence interpretation of the exclusionary rule, *see, e.g., Brown v. Illinois, supra,* 422 U.S. at 611 (Powell, J., concurring), this Court has recognized that concern for judicial integrity ultimately must be expressed in efforts to affect the behavior of law enforcement officers in the future. *E.g., United States v. Janis, supra,* 428 U.S. at 458-59 n. 35. If law enforcement officers are punished for failing to anticipate precisely judicial perceptions of good procedure and good judgment, deterrence will not be achieved. The police inevitably will abandon as futile any effort to conform their conduct to constitutional and legal standards. The deterrent impact of the exclusionary rule depends entirely upon the ability of law enforcement officers largely untrained in constitutional law to receive and understand the judicial message conveyed by the exclusionary sanction. *See United States v. Janis, supra,* 428 U.S. at 448. It is critical, therefore, that evidence be excluded only where the courts can speak with clarity and simplicity in condemning violations of constitutional rights.

It is difficult to conceive of a clearer, simpler medium for reaching law enforcement officers than their own agency's rules of conduct. In this case the lower courts have neither rebuked the agents for failing to anticipate refinements in judicial interpretations, *see United States v. Peltier, supra,* nor engaged in second-guessing of difficult, on-the-spot judgments. *Cf. Spinelli v. United States,* 393 U.S. 410, 438

(1969) (Fortas, J., dissenting); *United States v. Acosta,* 501 F.2d 1330, 1335 (5th Cir. 1974) (Gee, J., dissenting), *mod. en banc* 509 F.2d 539 (1975). They have only enforced the very code of conduct that IRS enforcement personnel are continually told to learn, review, and respect. Here the message to the agents—that if their agency's procedures are not honored, the courts will not honor in a criminal trial any evidence obtained by violating those regulations—is as clear and simple as the rules themselves.

This Court's increasing awareness that this need for clarity and simplicity places limits on the deterrent effect of excluding evidence has led it to decline to apply the rule where the connection between wrongful conduct and judicial sanctions is attenuated. In *United States v. Calandra, supra,* the Court refused to permit a grand jury witness to invoke the exclusionary rule to preclude questions relating to documents obtained in violation of the Fourth Amendment. The "incremental deterrent effect" of exclusionary sanctions was judged insignificant because "the incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." 414 U.S. at 351. The same reasoning led the Court to refuse to apply the exclusionary rule to federal habeas corpus petitions raising search and seizure claims already considered on direct appeal. The Court determined that law enforcement officers would be unlikely to assume that a violation would escape review at trial and upon appeal, but would be detected by collateral review. *Stone v. Powell, supra,* 428 U.S. at 492. Nor, as the Court concluded in *United States v. Janis, supra,* could law enforcement officers be expected to assume that misconduct might not be punished in a criminal

trial yet would lead to exclusionary sanctions in related civil litigation.

In these cases the Court has refused to extend the exclusionary rule to fora other than trials of criminal cases. The results of these refinements in the exclusionary principle has been to confine the rule to the sphere in which it is most effective. The Court has made it clear, however, that these developments do not disturb the fundamental place of the sanction in cases, like this one, where the Government seeks to base a criminal conviction upon evidence its agents have acquired unlawfully. The lower courts' application of the exclusionary rule here cannot be overturned without embracing the far-reaching proposition unsuccessfully offered by the Government in *Franks v. Delaware, supra,* ..... U.S. ....., 57 L.Ed.2d at 679: that "interfering with a criminal conviction in order to deter official misconduct is a burden too great to impose on society."[24] *See United States v. Calandra, supra,* 414 U.S. at 348; *United States v. Janis, supra,* 428 U.S. at 453. To abandon this most direct and important application of the exclusionary rule would be particularly inappropriate here, in light of the unusual clarity and simplicity of the message conveyed to investiga-

24. The Government notes (Gov. Br. at 37 n. 19) that the exclusionary rule can be a blunt instrument. As it concedes, however, (Gov. Br. at 38), the measure of the sanction imposed in this case is tailored precisely to the contours of the violation committed: absent other defects in admissibility, the live testimony of a law enforcement officer who participated in a conversation during which consensual monitoring or eavesdropping occurred may be received in evidence. The Government is deprived not of its prosecution *per se,* but only of that which it acquired unlawfully. The admissibility of Agent Yee's version of the taped conversations, of course, is not at issue on this appeal. Respondent's suppression motion was directed solely at the tape recordings. Whether, as the Government presumes, Agent Yee may so testify must await inquiry at trial into any overreaching, deception, or other improprieties in his dealings with Dr. Caceres that may taint his testimony.

tive agents where the courts enforce administratively adopted standards, rather than judicial perceptions of the constitutional requirements.

B. There Are No Special Circumstances Warranting Relief from Application of the Exclusionary Rule in This Case.

The Government argues (Gov. Br. at 39) that if evidence acquired in violation of agency regulations is excluded, the agencies will repeal their rules. Taking at face value the expressions of grave concern the IRS has repeatedly communicated to Congressional committees concerning violations of its regulations, it must be assumed that the agency will not abandon its standards lightly. Moreover, if the Government is correct in its assertion (Gov. Br. at 22-23, n. 5) that cost control and other efficiency considerations are an important purpose served by the regulations, the IRS can be expected to be particularly reluctant to relinquish control over use of electronic eavesdropping and monitoring equipment by enforcement-level agents.

There is certainly no support in the history of these and similar regulations for the idea that federal agencies will forsake their rules if the courts enforce them. Judicial enforcement of agency procedures applied in the agencies' own adjudicative settings, of course, is not new. The courts have never hesitated to hold agencies bound by such rules out of fear that the agencies might conclude that less process is due. The IRS's regulations requiring *Miranda* warnings in noncustodial settings were adopted in 1967. They have remained in effect from the time of the exclusionary decisions of the First, Fourth and Ninth Circuits in *United States v. Heffner, supra, United States v. Leahey, supra,* and *United States v. Sourapas, supra,* to the present day. In the wake of the Second Circuit's exclusion of evidence on the basis of noncompliance with the prosecutorial custom of informing grand jury witnesses of their "target"

status, restraints have actually been strengthened. After *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. granted* 431 U.S. 937 (1977), *cert. dismissed as improvidently granted*, 98 S.Ct. 1873 (1978), the unwritten custom of warning grand jury targets apparently was incorporated into the United States Attorneys Manual. *See* Transcript of Oral Argument before this Court in Case No. 76-1193 at 23. Finally, the Ninth Circuit's decision in this case has been controlling authority for over two years, and during that period the regulations governing electronic eavesdropping and monitoring have remained substantially unchanged.

The idea that law enforcement agencies will withdraw procedural safeguards if confronted with exclusionary sanctions necessarily rests upon the assumption that the application of the exclusionary rule will result in the loss of a substantial amount of probative evidence. If the Government is correct in its assertion (Gov. Br. at 37) that the agency's disciplinary powers are an effective deterrent to violations of agency regulations, such losses will not occur, because the misconduct that would evoke the sanction would occur only rarely. If internal agency discipline is ineffective, the sanction of the exclusionary rule will result in very little loss of probative evidence so long as application of the rule has the desired deterrent effect: once again, violations will be rare. As discussed above, the deterring message of the exclusionary sanction is strongest, because it is simple and clear, when expressed through an agency's own code of conduct. The Court has recognized the inherent difficulties in adducing reliable and empirical evidence concerning the impact of the exclusionary rule, *United States v. Janis*, *supra*, 428 U.S. at 432, and disciplinary measures suffer from the same problems of proof. If the Government is correct in asserting the effectiveness of disciplinary

measures, the consequence of applying the exclusionary rule is merely to create a redundant sanction. On the other hand, if disciplinary measures are ineffective, the consequence of refusing to apply the exclusionary rule would be the absence of any deterrent protection against unlawful conduct.[25]

It should not be assumed, in any event, that modification of agency regulations because of the threat of exclusionary sanctions would be undesirable. If an agency cannot consistently meet a standard that it has ordered its agents to respect strictly, the standard should be changed. Policies that an agency regards as desirable but too demanding to be respected in every case can be expressed in precatory terms. *Cf. United States v. Walden*, *supra*; *United States v. Atlantic Richfield*, 297 F. Supp. 1061, 1072-73 (S.D.N.Y. 1969). The difference between precatory and mandatory standards is not merely a matter of language. As noted

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25. The Government's suggestion that IRS disciplinary measures eliminate the need for exclusionary sanctions is unrealistic. The unlimited discretion of law enforcement agencies over whether disciplinary measures should be taken renders such measures inherently inadequate. They lack the essential characteristic of any judicially cognizable remedy, in that they cannot be invoked by persons aggrieved by unauthorized intrusions against privacy. This Court has consistently recognized that disciplinary measures are not a proper substitute for the protection of constitutional rights afforded by exclusionary sanctions. *Franks v. Delaware*, *supra*, ... U.S. ...., 57 L.Ed.2d at 680-81; *Lee v. Florida*, 392 U.S. 378, 386-87 (1968); *United States v. Leahey*, *supra*, 434 F.2d at 10. Although the Government characterizes the exclusionary rule as a blunt instrument, that criticism applies with even greater force to disciplinary measures. Dismissal, the only disciplinary step likely to have a significant deterrent impact, is a drastic, irreversible sanction. To expect an agency to dismiss skilled, expensively trained investigative personnel, and thus to incur the dampening of morale certain to result from personally rebuking and punishing an investigator for being too aggressive, is unrealistic. The exclusionary sanction, on the other hand, punishes a single transgression by a single and equivalent penalty. In any event, the IRS's record of imposing disciplinary sanctions for violation of its electronic eavesdropping and monitoring rules has not been impressive. S.Res. 39 Hearings *supra*, at 1526-30 (Part 3), 1546-47 (Part 3), 2210-13 (Part 5); IRS Government Operations Hearings, *supra*, at 450-55.

above, agency regulations often stand in the place of legislative action. Curtailment of administrative restrictions on investigative conduct may, in particular cases, prompt a legislative reaction. To determine whether legislative controls are appropriate, Congress is entitled to clear expression of existing administrative restraints. An agency's written rules should reflect its enforcement practices. If it is not reasonable to bring the agency's practices into conformity with its rules, then the rules should be relaxed to require only what is reasonable in practice. *See Marshall v. Barlow's, supra,* —— U.S. ——, 56 L.Ed 2d at 315-16.

The Government has described the violations of agency regulations at issue here as isolated, technical, inadvertent, "harmless,"[26] and committed in "good faith"; and therefore inappropriate for the application of exclusionary sanctions (Gov. Br. 34-37). The assertion that violations of the IRS Manual are not widespread is unsupported. The Government introduced no evidence on that issue at the suppression hearing. In fact there is substantial evidence that investigative misconduct has continued to be a problem within the IRS after the adoption of regulations on electronic eavesdropping and monitoring, along with regulations on other investigative activities, in 1967. In 1974 the IRS conducted a special one-week audit of electronic eavesdropping and monitoring within the Intelligence Division during the previous year. IRS Government Operations Hearings, *supra, at* 398-413. Review of the available records

26. The Government has argued that the wrongdoing of the agents on January 31 and February 6 was at best a variant of "harmless error" because the agents subsequently obtained permission to monitor and eavesdrop during the February 11 conversation. This Court rejected that argument under the same circumstances in *United States v. Giordano, supra,* 416 U.S. at 533; *see United States v. King, supra,* 478 F.2d at 505. Moreover, here the request for authorization contained a misrepresentation.

in various IRS field offices showed that twenty requests for authorization to conduct in-person electronic eavesdropping or monitoring were submitted to the Attorney General by the Intelligence Division during that period. During the same period, eighteen Special Agents were involved in thirty-five to forty instances of improper in-person or telephonic eavesdropping or monitoring. Some of these instance included more than one communication; one instance included twenty different phone calls. *Id.* at 426-31. The special audit also revealed substantial noncompliance with the inventorying and record-keeping regulations governing electronic eavesdropping and monitoring equipment. For example, IRS National Office records showed twenty-eight induction coils (for use in telephonic eavesdropping and monitoring) on hand within the agency, but the special audit discovered fifty-seven such devices in IRS field offices. *Id.* at 430. The report summarizing this special audit concluded that

> Due to the fact that the inventory of electronic surveillance devices has been incorrect, and due to the unauthorized and unreported use of these devices, the annual reports to the Attorney General have been inaccurate.

Id. at 431. The agency has also had difficulty preventing improper collection and retention of non-tax-related information by investigative agents. Legislative oversight hearings in 1975 focused in part upon "Operation Leprechaun" and "Operation Sunshine", in which IRS agents gathered and placed into the agency's Information Gathering and Retrieval System non-tax-related information on the social habits and private lives of local political figures in Miami, Florida. Internal Revenue Service Intelligence Operations:

Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 45-47, 541-68, 656, 666-69 (1975) ("IRS Ways and Means Hearings").

Respondent does not take issue with the Government's view that the exclusionary rule should not be applied where violations are merely technical or inadvertent. The Government's characterization of the events on which the courts below based their rulings, however, is inaccurate. The facts have been set forth elsewhere in this brief and do not require repetition here. The district court found the violations to be substantial. That finding is supported by repeated, unexcused, and largely unexplained misconduct by the agents. No reasons have been offered for the agent's failure to seek authorization during the ten-month hiatus in the investigation; for the failure to seek authorization between the time of Agent Yee's January 27, 1975 meeting and the eavesdropping conducted on January 31; for the scheduling of immediate meetings precluding timely authorization requests, despite the conceded lack of any necessity for doing so;[27] for the failure to process

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27. Agent Yee's January 30 conversation with Dr. Caceres clearly shows his control over the timing of their meetings:

"YEE: Dr. Caceres?

"CACERES: Yes; how are you?

"YEE: Not bad. Yourself?

"CACERES: Fine, thank you. You just caught me in.

"YEE: Yeah, I've been trying to get ahold of you this afternoon.

"CACERES: I'm a little bit out of breath.

"YEE: Oh, well; ah say, I've been considering the case and ah what we've been talking about this week and ah maybe I could be a, have a little bit more latitude on, on the time factor but uhm I want to meet with you ah tomorrow and discuss ah these things.

"CACERES: All right. Well, I'll arrange my schedule to your convenience."

(A. 14-15)

the January 31 authorization request for over a week; or for the misrepresentation made to the Attorney General in the written authorization request submitted on February 10, which recited that Dr. Caceres initiated the meetings with Agent Yee (A. 78). The Ninth Circuit sustained the district court's findings and later described the agents' conduct as "intentional circumvention of administrative regulations." *United States v. Choate*, 576 F.2d 165, 173 (9th Cir. 1978).[28]

The Government's claim of good faith must be evaluated in light of the agents' presumably intimate familiarity with the required procedures. When abuses of electronic eavesdropping and monitoring within the IRS were discovered in 1965, directives were issued to investigative personnel emphasizing the need for strict compliance with IRS policies on privacy. S.Res. 39 Hearings, *supra*, at 1126-27 (Part 3), S.928 Hearings, *supra*, at 30-32. Meetings were held to acquaint IRS personnel with the procedures adopted in 1967. Stand. Fed. Tax Rep. (CCH) ¶ 6711 at 71,756 (1967) (Resp. App. at 27). The agency's regulations on electronic eavesdropping and monitoring are explained to new investigative agents as part of their orientation, and reviews of IRS policy on eavesdropping and monitoring are frequent. IRS Government Operations Hearings, *supra*, at 411, 448; Internal Revenue Manual ¶ 9389.9 (requiring semi-annual reviews of eavesdropping and monitoring policies with all IRS technical personnel). An information notice calling special attention to the restrictions on elec-

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28. The ample support for these findings also renders unnecessary any rebuttal to the Government's extensive argument (Gov. Br. at 16-17 n. 4) that no violation of the regulations occurred. As the Government acknowledges, the correctness of the findings below is not at issue in this Court.

tronic eavesdropping and monitoring and directing field offices to hold meetings to discuss the restrictions with all IRS employees was distributed on March 25, 1974—just four days after the first conversation electronically monitored during the investigation of this case. IRS Government Operations Hearings, *supra*, at 410, 452. Under these circumstances the Government has no legitimate claim to any "good faith" exception from exclusionary rule sanctions. *See Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

III. THE SUPERVISORY POWER OF THE FEDERAL COURTS PROVIDES AN ALTERNATIVE BASIS FOR EXCLUSION OF THE RECORDINGS.

The decisions of the Ninth, First, and Fourth Circuits in *United States v. Sourapas, supra, United States v. Leahey, supra*, and *United States v. Heffner, supra*, relied on by the lower courts in this case, rested upon due process principles. The district court and the court of appeals also could have based their decisions on their supervisory power had they not regarded these authorities as controlling. If the Court were to conclude that exclusion of the recordings cannot be sustained on the constitutional basis relied on by the court of appeals, this case should be remanded to the district court to consider whether a discretionary exercise of its supervisory power is appropriate.

The Government does not contend, of course, that the federal courts have no supervisory power, or that such power cannot be exercised in criminal cases. *Hampton v. United States*, 425 U.S. 484, 491-95 (1976) (Powell, J. and Blackmun, J. concurring); *Rea v. United States*, 350 U.S. 214 (1956); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *Burton v. United States*, 483 F.2d 1182 (9th Cir. 1973)

and cases cited therein. The Government argues that under the circumstances of this case, an exercise of supervisory power to exclude evidence would be in derogation of limitations Congress has placed upon this power and, even absent such limitations, could not be supported by evidence of sufficiently serious misconduct.[29] The enactments relied on by the Government do not affect the supervisory power of the federal courts, and the conduct of the agents provides ample evidence to warrant further factual inquiry by the district court.

A federal statute dealing with confessions (18 U.S.C. § 3501 (1968)) and Rule 402 of the Federal Rules of Evidence are offered by the Government to show that the exercise of supervisory power in this case is contrary to the expressed will of Congress. Section 3501, however, confers no special evidentiary dignity upon confessions or other purportedly inculpatory statements. Its purpose is to make voluntariness the test of admissibility of confessions, so as to avoid exclusion of such statements solely on the basis of delay in arraignment. *See United States v. Halbert*, 436 F.2d 1226, 1231-34 (9th Cir. 1970); 1968 U.S. Code Cong. & Ad. News 2112, 2124-25. Rule 402 merely restates the familiar principle that relevant evidence not otherwise improper is admissible. As the Second Circuit noted in *United States v. Jacobs, supra*, 547 F.2d at 777, the Government has cited no authority for its extreme interpretation of Rule 402, and specifically no authority for the

29. The Government also criticizes the exercise of supervisory power by the courts over the actions of other branches of government. (Gov. Br. at 41, 43 n. 25). This criticism is a reiteration of the idea that the courts should not impose judicial perceptions of proper law enforcement practice upon the Executive Branch except in compelling cases. *Cf. United States v. Russell*, 411 U.S. 423, 435 (1973). Although undoubtedly a wise admonition, there can be no rational claim of judicial overreaching where the Executive Branch itself has set the standards.

idea that Congress, in enacting the rule, "was concerning itself with the supervisory powers of the federal courts," which have "inherent power to refuse to receive material evidence" in a proper case. *Lopez v. United States, supra,* 373 U.S. at 440.

There are no hard and fast rules for determining what constitutes a proper case for an exercise of supervisory power. *See United States v. Narciso,* 446 F. Supp. 252, 302 (E.D. Mich. 1977). In *Lopez v. United States, supra,* 373 U.S. at 440 the Court suggested that such exercises should be limited to cases in which "manifestly improper conduct" has occurred. Although the Court found no improper conduct in that case, it noted that such a finding could be premised upon a violation of a statute or "rule of procedure". *Id.; see Mallory v. United States,* 354 U.S. 449 (1957). The value preserved by exercising supervisory power is the maintenance of "civilized standards of procedure and evidence." *McNabb v. United States,* 318 U.S. 332, 340-41 (1943). Therefore the use of supervisory power should be confined to the enforcement and upholding of standards protective of important interests. Moreover, because the remedy through which supervisory power is to be exercised is usually an exclusionary order, the considerations of deterrence which underlie the exclusionary rule require that supervisory power be exercised only where the violation of an investigative standard is a substantial one.

The circumstances of this case satisfy these preconditions to the exercise of supervisory power. As demonstrated above, the investigative standards at issue here were created to protect privacy. The agents' misconduct in violating these standards was serious and substantial. During the ten-month hiatus between the initial allegation of bribery and the events at issue in this case, they made no effort to obtain

authorization for electronic eavesdropping. They waited an additional four days after the last of the events referred to in the application for authorization eventually submitted. That submission occurred only after the agents had themselves scheduled a meeting without sufficient advance notice to permit proper processing of the application—despite the conceded willingness of the taxpayer to conform to their schedules and the absence of any reason for haste. During the ensuing week after the first eavesdropping incident, the agents did nothing to follow up on their application. Higher officials within the agency did nothing to process the application for reasons the Government has never explained. The application eventually submitted to the Justice Department contained a statement by the investigative agents made either with knowledge of its falsity or in reckless disregard of the truth. *See United States v. Luna,* 525 F.2d 4 (6th Cir. 1975), *cert. denied* 424 U.S. 965 (1976).

The exercise of supervisory power is a matter for the trial court's discretion, abuse of which may be corrected by the appellate courts. *United States v. Fields,* 1978 CCH Fed. Sec. L. Rep. ¶ 96,552 at 94, 272 (2d Cir. 1978); *United States v. Rodman,* 519 F.2d 1058 (1st Cir. 1975); *see* Brief of the United States in *United States v. Jacobs,* No. 76-1193 at 73 (October Term 1977). The foregoing facts provide a clear predicate for further factual inquiry by the trial court to aid in its exercise of discretion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MORRISON & FOERSTER
JAMES J. BROSNAHAN
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November 1978.

Appendix

PREPARED STATEMENT OF HON. EDWARD H. LEVI,
ATTORNEY GENERAL OF THE UNITED STATES
Before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities,
November 6, 1975

In: Electronic Surveillance within the United States for Foreign Intelligence Purposes: Hearings before the Subcommittee on Intelligence and the Rights of Americans of the Select Committee on Intelligence of the United States Senate, 94th Cong., 2nd Sess. on S. 3197, The Foreign Intelligence Surveillance Act of 1976, June 29, July 1, August 6, 10 and 24, 1976.

As I read the history, going back to 1931 and undoubtedly prior to that time, except for an interlude between 1928 and 1931, and for two months in 1940, the policy of the Department of Justice has been that electronic surveillance could be employed without a warrant in certain circumstances.

In 1928 the Supreme Court in *Olmstead v. United States* held that wiretapping was not within the coverage of the Fourth Amendment. Attorney General Sargent had issued an order earlier in the same year prohibiting what was then known as the Bureau of Investigation from engaging in any telephone wiretapping for any reason. Soon after the order was issued, the Prohibition Unit was transferred to the Department as a new bureau. Because of the nature of its work and the fact that the Unit had previously engaged in telephone wiretapping, in January 1931, Attorney General William D. Mitchell directed that a study be made to determine whether telephone wiretapping should be permitted and, if so, under what circumstances. The Attorney General determined that in the meantime the bureaus within

the Department could engage in telephone wiretapping upon the personal approval of the bureau chief after consultation with the Assistant Attorney General in charge of the case. The policy during this period was to allow wiretapping only with respect to the telephones of syndicated bootleggers, where the agent had probable cause to believe the telephone was being used for liquor operations. The bureaus were instructed not to tap telephones of public officials and other persons not directly engaged in the liquor business. In December 1931, Attorney General William Mitchell expanded the previous authority to include "exceptional cases where the crimes are substantial and serious, and the necessity is great and [the bureau chief and the Assistant Attorney General] are satisfied that the persons whose wires are to be tapped are of the criminal type."

During the rest of the thirties it appears that the Department's policy concerning telephone wiretapping generally conformed to the guidelines adopted by Attorney General William Mitchell. Telephone wiretapping was limited to cases involving the safety of the victim (as in kidnappings), location and apprehension of "desperate" criminals, and other cases considered to be of major law enforcement importance, such as espionage and sabotage.

In December 1937, however, in the first *Nardone* case the United States Supreme Court reversed the Court of Appeals for the Second Circuit, and applied Section 605 of the Federal Communications Act of 1934 to law enforcement officers, thus rejecting the Department's argument that it did not so apply. Although the Court read the Act to cover only wire interceptions where there had been disclosure in court or to the public, the decision undoubtedly had its impact upon the Department's estimation of the value of telephone wiretapping as an investigative technique. In the

second *Nardone* case in December 1939, the Act was read to bar the use in court not only of the overhead [sic] evidence, but also of the fruits of that evidence. Possibly for this reason, and also because of public concern over telephone wiretapping, on March 15, 1940, Attorney General Robert Jackson imposed a total ban on its use by the Department. This ban lasted about two months.

On May 21, 1940, President Franklin Roosevelt issued a memorandum to the Attorney General stating his view that electronic surveillance would be proper under the Constitution where "grave matters involving defense of the nation" were involved. The President authorized and directed the Attorney General "to secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." The Attorney General was requested "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens." Although the President's memorandum did not use the term "trespassory microphone surveillance," the language was sufficiently broad to include that practice, and the Department construed it as an authorization to conduct trespassory microphone surveillances as well as telephone wiretapping in national security cases. The authority for the President's action was later confirmed by an opinion by Assistant Solicitor General Charles Fahy who advised the Attorney General that electronic surveillance could be conducted where matters affected the security of the nation.

On July 17, 1946, Attorney General Tom C. Clark sent President Truman a letter reminding him that President Roosevelt had authorized and directed Attorney General Jackson to approve "listening devices [directed at] the con-

versation of [sic] other communications of persons suspected of subservise activities against the Government of the United States, including suspected spies" and that the directive had been followed by Attorneys General Robert Jackson and Francis Biddle. Attorney General Clark recommended that the directive "be continued in force" in view of the "increase in subversive activities" and "a very substantial increase in crime." He stated that it was imperative to use such techniques "in cases vitally affecting the domestic security, or where human life is in jeopardy" and that Department files indicated that his two most recent predecessors as Attorney General would concur in this view. President Truman signed his concurrence on the Attorney General's letter.

According to the Department's records, the annual total of telephone wiretaps and microphones installed by the Bureau between 1940 through 1951 was as follows:

Telephone wiretaps:		Microphones:	
1940	6	1940	6
1941	67	1941	25
1942	304	1942	88
1943	475	1943	193
1944	517	1944	198
1945	519	1945	186
1946	364	1946	84
1947	374	1947	81
1948	416	1948	67
1949	471	1949	75
1950	270	1950	61
1951	285	1951	75

It should be understood that these figures, as in the case for the figures I have given before, are cumulative for each year and also duplicative to some extent, since a telephone wiretap or microphone which was installed, then discontinued, but later reinstated would be counted as a new action upon reinstatement.

In 1952, there were 285 telephone wiretaps, 300 in 1953, and 322 in 1954. Between February 1952 and May 1954, the Department's position was not to authorize trespassory microphone surveillance. This was the position taken by Attorney General McGrath, who informed the FBI that he would not approve the installation of trespassory microphone surveillance because of his concern over a possible violation of the Fourth Amendment. FBI records indicate there were 99 installed in 1954. The policy against Attorney General approval, at least in general, of trespassory microphone surveillance was reversed by Attorney General Herbert Brownell on May 20, 1954, in a memorandum to Director Hoover instructing him that the Bureau was authorized to conduct trespassory microphone surveillances. The Attorney General stated that "considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest."

A memorandum from Director Hoover to the Deputy Attorney General on May 4, 1961, described the Bureau's practice since 1954 as follows: "[I]n the internal security field, we are utilizing microphone surveillances on a restricted basis even though trespass is necessary to assist in uncovering the activities of Soviet intelligence agents and Communist Party leaders. In the interests of national safety, microphone surveillances are also utilized on a restricted basis, even though trespass is necessary, in uncovering major criminal activities. We are using such coverage in connection with our investigations of the clandestine activities of top hoodlums and organized crime. From an intelligence standpoint, this investigative technique has produced results unobtainable through other means. The information so obtained is treated in the same manner as

information obtained from wiretaps, that is, not from the standpoint of evidentiary value but for intelligence purposes."

[at pp. 23-25]

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The law has not lost its inventiveness, and it might be possible to fashion new judicial approaches to the novel situations that come up in the area of foreign intelligence. I think it must be pointed out that for the development of such an extended, new kind of warrant, a statutory base might be required or at least appropriate. At the same time, in dealing with this area, it may be mistaken to focus on the warrant requirement alone to the exclusion of other, possibly more realistic, protections.

What, then, is the shape of the present law? To begin with, several statutes appear to recognize that the Government does intercept certain messages for foreign intelligence purpose and that this activity must be, and can be, carried out. Section 952 of Title 18, which I mentioned earlier is one example; section 798 of the same title is another. In addition, Title III's proviso, which I have quoted earlier, explicitly disclaimed any intent to limit the authority of the Executive to conduct electronic surveillance for national security and foreign intelligence purposes. In an apparent recognition that the power would be exercized, Title III specifies the conditions under which information obtained through Presidentially authorized surveillance may be received into evidence. It seems clear, therefore, that in 1968 Congress was not prepared to come to a judgment that the Executive should discontinue its activities in this area, nor was it prepared to regulate how those activities were to be conducted. Yet it cannot be said that Congress has been entirely silent on this matter. Its express statutory

references to the existence of the activity must be taken into account.

The case law, although unsatisfactory in some respects, has supported or left untouched the policy of the Executive in the foreign intelligence area whenever the issue has been squarely confronted. The Supreme Court's decision in the *Keith* case in 1972 concerned the legality of warrantless surveillance directed against a domestic organization with no connection to a foreign power and the Government's attempt to introduce the product of the surveillance as evidence in the criminal trial of a person charged with bombing a C.I.A. office in Ann Arbor, Michigan. In part because of the danger that uncontrolled discretion might result in use of electronic surveillance to deter domestic organizations from exercising First Amendment rights, the Supreme Court held that in cases of internal security, when there is no foreign involvement, a judicial warrant is required. Speaking for the Court, Justice Powell emphasized that "this case involves only the domestic aspects of national security". We have expressed no opinion as to the issues which may be involved with respect to activities of foreign powers or their agents.

As I observed in my remarks at the ABA convention, the Supreme Court surely realized, "in view of the importance the Government has placed on the need for warrantless electronic surveillance that, after the holding in *Keith*, the Government would proceed with the procedures it had developed to conduct those surveillances not prohibited—that is, in the foreign intelligence area or, as Justice Powell said, 'with respect to activities of foreign powers and their agents.'"

The two federal circuit court decisions after *Keith* that have expressly addressed the problem have both held that

the Fourth Amendment does not require a warrant for electronic surveillance instituted to obtain foreign intelligence. In the first, *United States v. Brown* the defendant, an American citizen, was incidentally overheard as the result of a warrantless wiretap authorized by the Attorney General for foreign intelligence purposes. In upholding the legality of the surveillance, the Court of Appeals for the Fifth Circuit declared that on the basis of "the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs . . . the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence." The court added that "(r)estrictions on the President's power which are appropriate in cases of domestic security become inappropriate in the context of the international sphere."

In *United States v. Butenko* the Third Circuit reached the same conclusion—that the warrant requirement of the Fourth Amendment does not apply to electronic surveillance undertaken for foreign intelligence purposes. Although the surveillance in that case was directed at a foreign agent, the court held broadly that the warrantless surveillance would be lawful so long as the primary purpose was to obtain foreign intelligence information. The court stated that such surveillance would be reasonable without a warrant even though it might involve the overhearing of conversations of "alien officials and agents, and perhaps of American citizens." I should note that although the United States prevailed in the *Butenko* case, the Department acquiesced in the petitioner's application for *certiorari* in order to obtain the Supreme Court's ruling on the question. The Supreme Court denied review, however, and thus left

the Third Circuit's decision undisturbed as the prevailing law.

Most recently, in *Zweibon v. Mitchell,* decided in June of this year, the District of Columbia Circuit dealt with warrantless electronic surveillance directed against a domestic organization allegedly engaged in activities affecting this country's relations with a foreign power. Judge Skelly Wright's opinion for four of the nine judges makes many statements questioning any national security exception to the warrant requirement. The court's actual holding made clear in Judge Wright's opinion was far narrower and, in fact, is consistent with holdings in *Brown* and *Butenko.* The court held only that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power." This holding, I should add, was fully consistent with the Department of Justice's policy prior to the time of the *Zweibon* decision.

With these cases in mind, it is fair to say electronic surveillance conducted for foreign intelligence purposes, essential to the national security, is lawful under the Fourth Amendment, even in the absence of a warrant, at least where the subject of the surveillance is a foreign power or an agent or collaborator of a foreign power. Moreover, the opinions of two circuit courts stress the purpose for which the surveillance is undertaken, rather than the identity of the subject. This suggests that in their view such surveillance without a warrant is lawful so long as its purpose is to obtain foreign intelligence.

But the legality of the activity does not remove from the Executive or from Congress the responsibility to take steps, within their power, to seek an accommodation between the vital public and private interests involved. In our effort

to seek such an accommodation, the Department has adopted standards and procedures designed to ensure the reasonableness under the Fourth Amendment of electronic surveillance and to minimize to the extent practical the intrusion on individual interests. As I have stated, it is the Department's policy to authorize electronic surveillance for foreign intelligence purposes only when the subject is a foreign power or an agent of a foreign power. By the term "agent" I mean a conscious agent; the agency must be of a special kind and must relate to activities of great concern to the United States for foreign intelligence or counter intelligence reasons. In addition, at present, there is no warrantless electronic surveillance directed against any American citizen, and although it is conceivable that circumstances justifying such surveillance may arise in the future. I will not authorize the surveillance unless it is clear that the American citizen is an active, conscious agent or collaborator of a foreign power. In no event, of course, would I authorize any warrantless surveillance against domestic persons or organizations such as those involved in the *Keith* case. Surveillance without a warrant will not be conducted for purposes of security against domestic or internal threats. It is our policy, moreover, to use the Title III procedure whenever it is possible and appropriate to do so, although the statutory provisions regarding probable cause, notification, and prosecutive purpose make it unworkable in all foreign intelligence and many counterintelligence cases.

The standards and procedures that the Department has established within the United States seek to ensure that every request for surveillance receives thorough and impartial consideration before a decision is made whether to institute it. The process is elaborate and time-consuming,

but it is necessary if the public interest is to be served and individual rights safeguarded.

I have just been speaking about telephone wiretapping and microphone surveillances which are reviewed by the Attorney General. In the course of its investigation, the committee has become familiar with the more technologically sophisticated and complex electronic surveillance activities of other agencies. These surveillance activities present somewhat different legal questions. The communications conceivably might take place entirely outside the United States. That fact alone, of course, would not automatically remove the agencies' activities from scrutiny under the Fourth Amendment since at times even communications abroad may involve a legitimate privacy interest of American citizens. Other communications conceivably might be exclusively between foreign powers and their agents and involve no American terminal. In such a case, even though American citizens may be discussed, this may raise less significant, or perhaps no significant, questions under the Fourth Amendment. But the primary concern, I suppose, is whether reasonable minimization procedures are employed with respect to use and dissemination.

With respect to all electronic surveillance, whether conducted within the United States or abroad, it is essential that efforts be made to minimize as much as possible the extent of the intrusion. Much in this regard can be done by modern technology. Standards and procedures can be developed and effectively deployed to limit the scope of the intrusion and the use to which its product is put. Various mechanisms can provide a needed assurance to the American people that the activity is undertaken for legitimate foreign intelligence purposes, and not for political or other improper purposes. The procedures used should not

be ones which by indirection in fact target American citizens and resident aliens where these individuals would not themselves be appropriate targets. The proper minimization criteria can limit the activity to its justifiable and necessary scope.

Another factor must be recognized. It is the importance or potential importance of the information to be secured. The activity may be undertaken to obtain information deemed necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

Need is itself a matter of degree. It may be that the importance of some information is slight, but that may be impossible to gauge in advance; the significance of a single bit of information may become apparent only when joined to intelligence from other sources. In short, it is necessary to deal in probabilities. The importance of information gathered from foreign establishments and agents may be regarded generally as high—although even here there may be wide variations. At the same time, the effect on individual liberty and security—at least of American citizens—caused by methods directed exclusively to foreign agents, particularly with minimization procedures, would be very slight.

There may be regulatory and institutional devices other than the warrant requirement that would better assure that intrusions for national security and foreign intelligence purposes reasonably balance the important needs of Government and of individual interests. In assessing possible approaches to this problem it may be useful to examine the

practices of other Western democracies. For example, England, Canada, and West Germany each share our concern about the confidentiality of communications within their borders. Yet each recognizes the right of the Executive to intercept communications without a judicial warrant in cases involving suspected esponionage, subversion or other national security intelligence matters.

In Canada and West Germany, which have statutes analogous to Title III, the Executive in national security cases is exempt by statute from the requirement that judicial warrants be obtained to authorize surveillance of communications. In England, where judicial warrants are not required to authorize surveillance of communications in criminal investigations, the relevant statutes recognize an inherent authority in the Executive to authorize such surveillance in national security cases.[1] In each country, this authority is deemed to cover interception of mail and telegrams, as well as telephone conversations.

In all three countries, requests for national security surveillance may be made by the nation's intelligence agencies. In each, a Cabinet member is authorized to grant the request.

In England and West Germany, however, interception of communications is intended to be a last resort, used only when the information being sought is likely to be unobtainable by any other means. It is interesting to note, however, that both Canada and West Germany do require the Execu-

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1. Report of the Committee on Privy Councillors appointed to inquire into the interception of communications (1957), which states, at page 5, that, "The origin of the power to intercept communications can only be surmised, but the power has been exercised from very early times; and has been recognised as a lawful power by a succession of statutes covering the last 200 years or more."

tive to report periodically to the Legislature on its national security surveillance activities. In Canada, the Solicitor General files an annual report with the Parliament setting forth the number of national security surveillances initiated, their average length, a general description of the methods of interception or seizure used, and assessment of their utility.

It may be that we can draw on these practices of other Western democracies, with appropriate adjustments to fit our system of separation of powers. The procedures and standards that should govern the use of electronic methods of obtaining foreign intelligence and of guarding against foreign threats are matters of public policy and values. They are of critical concern to the Executive Branch and to Congress, as well as to the courts. The Fourth Amendment itself is a reflection of public policy and values—an evolving accommodation between governmental needs and the necessity of protecting individual security and rights. General public understanding of these problems is of paramount importance, to assure that neither the Executive, nor the Congress, nor the courts risk discounting the vital interests on both sides.

The problems are not simple. Evolving solutions probably will and should come—as they have in the past—from a combination of legislation, court decisions, and executive actions. The law in this area, as Lord Devlin once described the law of search in England, "is haphazard and ill defined." It recognized the existence and the necessity of the Executive's power. But the Executive and the Legislature are, as Lord Devlin also said, "expected to act reasonably." The future course of the law will depend on whether we can meet that obligation.

[at pp. 37-40]

MANUAL
SUPPLEMENT
Department of The Treasury, Internal Revenue Service

April 11, 1974 *Consensual Monitoring of Private Conversations in Criminal Investigations*

Section 1. Purpose

This Supplement implements Policy Statement P-9-35 (approved 10-26-73), and Department of Justice Guidelines on monitoring private conversations dated October 16, 1972.

Section 2. Background

The monitoring of conversations with the consent of one of the participants is an effective and reliable investigative technique but must be sparingly and carefully used. The Department of Justice has encouraged its use by criminal investigators where it is both appropriate and necessary to establish a criminal offense. While such monitoring is constitutionally and statutorily permissible, this investigative technique is subject to careful regulation in order to avoid any abuse or any unwarranted invasion of privacy.

Section 3. Designated Officials

.01 The monitoring of telephone conversations with the consent of one or all parties may be authorized by the Chief, Intelligence Division; the Assistant Regional Inspector (Internal Security); the Chief of the National Office Investigations Branch (Internal Security); the Chief of National Office Operations Branch (Intelligence); or in the absence of any of them, the person acting in his place. This authority cannot be redelegated.

.02 Other than in criminal investigations, the recording of telephone calls by use of mechanical, electronic or any other device is prohibited.

.03 The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Intelligence Division; the Director, Internal Security Division; or, in their absence, the Acting Directors. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division, or the Director, Intelligence Division, cannot be reached, the Assistant Commissioner (Inspection) or the Assistant Director, Intelligence Division, may grant emergency approval. This authority cannot be redelegated.

.04 There are no restrictions on any non-telephone monitoring when all parties to the conversation consent.

.05 The use of monitoring equipment as authorized by the designated officials in Section 3.01 and Section 3.03 above, is limited to Criminal Investigators (GS-1811 series) or to persons acting under the direction of Criminal Investigators. The prohibitions and limitations outlined in Policy Statement P-9-35 apply equally to Service personnel and to non-Service persons who act at the direction of Criminal Investigators.

.06 Monitoring of private conversations will be authorized only when, in the considered judgment of the designated official, such action is warranted and necessary to effective law enforcement.

Section 4. Annual Reports

The Assistant Commissioner (Inspection) shall submit to the Assistant Attorney General, Criminal Division, an annual report during July of each year containing: an inventory of all the Service's electronic and mechanical equipment designed for monitoring conversations; and a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.

Section 5. Other Restrictions

A device, such as a "pen register," designed solely to identify telephone numbers, may be employed only when authorized by an appropriate order in the nature of a search warrant under Rule 41, Federal Rules of Criminal Procedures. [sic]

Section 6. Effect on Other Documents

.01 This amends and supplements IRM 9383.5, 9453.2, MS CR 94G-34, dated July 10, 1967, and 682 of IRM (10)111, Instructional Handbook for Inspectors of the Internal Security Division. This also supplements IRM 9900, Handbook for Special Agents.

.02 The above "effect" should be annotated in pen and ink on the cited text and Supplement, with a reference to this Supplement.

DONALD C. ALEXANDER
Commissioner

Attachment: Policy Statement

INTERNAL REVENUE MANUAL, PART X—INSPECTION

652.4

Custody of Electronic Equipment

(1) Devices designed for consensual monitoring of conversations for investigative purposes will be stored as feasible, in one central location or in a limited number of locations, so as to facilitate administrative control. The equipment will be maintained in locked storage and will be accounted for at all times.

(2) The Regional Inspector and Chief, Investigations Branch, will designate one Inspector as an Equipment Custodian, with one or more alternates, to have the responsibility for custody and maintenance of investigative equipment in peak operating condition at all times. Consideration should be given to adjusting the Equipment Custodian's workload so he/she has available time for investigative equipment responsibilities. Access to investigative equipment should be limited to the Regional Inspector, the Assistant Regional Inspector (Internal Security), his/her Executive Assistant and the Equipment Custodian and alternate.

(3) The Equipment Custodian will maintain an inventory filing card record system listing on separate cards each piece of investigative equipment with accessories. Each card will contain a description of the equipment, name of manufacturer, model number, serial number, and date acquired or received by that office. When equipment is assigned to a post of duty, the regional Equipment Custodian will obtain a Form 1931, Transfer/Receipt of Personal Property, signed by the Equipment Custodian or property officer at that post of duty. The regional Equipment Custodian will then post on his/her inventory card the date and post of duty where the equipment is located. The Equipment Custodian at that post of duty should also prepare inventory

filing cards on equipment assigned to his or her office in the same manner as described above.

(4) The Equipment Custodian will obtain or complete a Form 1930, Custody Receipt for Government Property, for any equipment removed from locked storage by himself/herself or another Inspector. The Form 1930 can be attached to the inventory filing card to show the temporary custody of that equipment. This same procedure may be used while equipment is on temporary loan to another agency or while it is being repaired. Upon return of equipment that has been used for consensual monitoring or surveillance, the Equipment Custodian or case Inspector will designate on the reverse side of the Form 1930: the case title and number, the date equipment was returned, and a list of the specific dates on which the equipment was used. Equipment located at posts of duty will be accounted for in this same manner.

(5) Upon completion of each Form 1930 where consensual monitoring or surveillance has been conducted, the Form 1930 will then be forwarded to the Regional Inspector or Chief, Investigations Branch, where it will be attached to the related request Form 5177 or 5178 in his or her Use of Electronic Equipment file.

(6) When equipment has been signed out on Forms 1930 for loan to another agency, for repair, for preparing duplicate copies of previously made tapes, for other purposes not directly related to actual investigative monitoring activity, upon return of the equipment the Form 1930 may be discarded.

(7) On June 30 of each year, the Equipment Custodian will prepare a Form 1926-A, Personal Property Inventory Worksheet—Equipment, listing a complete inventory of investigative equipment assigned to the region or the Investigations Branch. This inventory will be forwarded to the

National Office. The Assistant Commissioner (Inspection) shall submit to the Assistant Attorney General, Criminal Division, an annual report during July of each year containing: an inventory of all the Service's electronic and mechanical equipment designed for monitoring conversations, and a brief statement of the results obtained during the prior fiscal year by the use of such investigative monitoring.

IRS NEWS RELEASE NO. 890, JULY 13, 1967

The Internal Revenue Service issued the following statement:

Commissioner of Internal Revenue, Sheldon S. Cohen, released the facts on the use of electronic devices by the three IRS criminal investigation units during the eight-year period from 1958 through 1966. The same data was sent to Senator Edward V. Long of Missouri, in a report.

Release of this data fulfills Mr. Cohen's promise to the Senate Subcommittee on Administrative Practice and Procedure that a detailed accounting would be made to Congress and the American public when all of the facts had been gathered and tabulated.

In his letter to Senator Long, Mr. Cohen reported findings of a special IRS inquiry board and listed measures taken to assure that improper uses of electronic surveillance equipment, such as occurred prior to July of 1965, "cannot recur within the Internal Revenue Service."

Statistics reflecting hundreds of thousands of criminal investigations in the eight-year period between 1958 and 1966 showed the use of 94 wiretaps, 32 "bugs", 29 phone booth installations, and 132 other types of installations using electronic devices.

Mr. Cohen emphasized that these figures included both legal and questionable installations. He also pointed out that instances of improper use occurred prior to July of 1965 and with most cases taking place four and five years ago.

The report also listed 723 uses of a "pen register" which records the number dialed but not the conversation. The Supreme Court has not ruled on this issue, but pen registers were generally considered legal until December 1966 when one Appellate Court for the first time ruled adversely.

The report to Senator Long confirmed earlier IRS statements that use of electronic devices occurred only in the investigation of criminal violations by racketeers, gamblers, moonshiners or persons attempting to suborn the integrity of the IRS.

Citing the findings of the special IRS board named to investigate possible improper uses of electronic equipment, Mr. Cohen said "the board found no evidence of use of electronic devices for surveillance purposes other than in cases where the individuals were engaged in criminal or illegal activities."

"The significance of this is that there is no indication of any spill-over to 'ordinary audit cases,'" Mr. Cohen said.

During the hearings conducted by the Long Subcommittee, repeated charges were made that (a) use of electronic devices was widespread and (b) that they were used in connection with the routine investigations of ordinary taxpayers. The IRS report indicated these charges were unfounded.

Although the hearings focused on the IRS Intelligence Division which investigates gambling and other criminal tax violations, the report also includes data regarding the Alcohol & Tobacco Tax Division and the Inspection Service.

Mr. Cohen said the board's findings confirmed information previously reported and indicated the extent of IRS cooperation with the subcommittee.

Appearance of nearly 50 IRS officials and agents at public hearings between July 1965 and April 1967 with instructions to testify "fully and frankly" regarding all uses of electronic devices, was considered by IRS officials as a unique record of cooperation by a Federal agency. A large number of other IRS employees were also interviewed by the committee staff.

In summarizing results of the investigation by the special board, Mr. Cohen said the board "attributed the occurrences to (1) misunderstanding of applicable directives and instructions, (2) departures from the Service's normal line management direction and control, and (3) overzealousness on the part of certain personnel engaged in the investigation of the criminal element."

"The board concluded, after examining all the factors surrounding the transgressions that there was no basis for holding individual employees accountable and that the Internal Revenue Service as an institution must bear the blame for what occurred," he said.

Mr. Cohen said he had adopted the board's recommendations—as Senator Long had previously been apprised—of measures to assure that improper use of electronic devices could not recur within the Internal Revenue Service.

"To correct the situation, I issued unmistakably clear and detailed proscriptions on investigative techniques and set forth the Service's policy in drastic and unmistakable terms. Steps have also been taken to bring all facets of our investigative activity under the Service's normal National Office, Regional Office and District Office system of direction and control," Mr. Cohen said.

"Countless conferences and meetings have been held, hammering home the absolute prohibitions on improper use of electronic equipment. Acquisition of and access to, such equipment has been severely restricted. And training in the use of such equipment—even for defensive purposes—has been suspended," he added.

Although a preliminary tabulation of IRS use of electronic devices was completed some time ago, Mr. Cohen withheld a final report to the Long Subcommittee until a "double-check" could be undertaken in recent months to

assure that every single instance, of either legal or improper use was recorded.

It was recalled that during the early stages of the Subcommittee hearings, when each instance of impropriety was reported as soon as it was learned from any of a score of IRS field offices, statements were made that IRS had misrepresented the previous facts.

Recognizing the desirability of full revelation of past improprieties, and the need for prompt remedial action, Mr. Cohen emphasized "the very restrictive measures we have taken" to prevent improper actions in the future.

July 11, 1967
Washington 25, D. C.

Dear Senator Long:

I am pleased to transmit the complete tabulation of all installations of electronic surveillance equipment during the eight-year period beginning July 1, 1958. The Internal Revenue Service played a part in all these installations and no party to the conversation under surveillance had consented to the installations. Enclosed as Exhibit 1 are seventeen tables, with explanations and footnotes, reflecting particular types of installations and specifying the extent to which each of the Service's criminal investigative functions (the Alcohol and Tobacco Tax Division, the Inspection Service and the Intelligence Division) participated in each type of installation. There are further detailed breakdowns designed to provide the Subcommittee with a thorough chronological and geographic picture of the incidence of the subject installations.

As detailed in the Foreword to Exhibit 1, the five categories of tabulated installations were defined in narrative terms so that it would be clear that they did not turn on anyone's subjective evaluation of what was or was not within the law. For example, the first category covers "installations, intercepting phone conversations without the consent of either party" rather than purporting to cover such an ambiguous term as "wiretaps" since, as you are aware, authoritative constructions of the so-called federal "wiretap" statute hold that such interceptions do not *per se* constitute a violation. Similarly, Exhibit 1 refrains from characterizing the other categories of installations as legal or not because the simple fact is that the law is far from settled as to the legality of such installations as pen registers (which do not eavesdrop on conversations and which have been reviewed—adversely—at the court of appeals level only in the Seventh Circuit) or public phone booth installations (which do not eavesdrop on both sides of a conversation and have been reviewed—favorably—at the court of appeals level only in the Ninth Circuit).

In short, we deemed it of more value to the Subcommittee's task of proposing what the law should be to provide information of the Service's past investigative activities instead of intermixing controversial constructions of present law with such information.

The sum of it is that over the eight-year period beginning July 1, 1958, during which the Internal Revenue Service conducted hundreds of thousands of criminal investigations, personnel of the Service participated in: 94 installations, intercepting phone conservations [sic] without the consent of either party; 32 installations, overhearing or recording non-phone conversations without the consent of either party (involving possible intrusion upon a constitutionally protected area); 29 installations, overhearing or recording conversations from public phone booths without the consent of either party; 132 other installations, overhearing or recording conversations without the consent of either party; and 723 pen register installations.

I also transmit, as Exhibit 2, the complete, updated response to the Subcommittee's questionnaire. This, as you know, required exhaustive inquiry from Service criminal investigative personnel and extensive analysis and tabulation in the Service's National Office of data submitted from investigative posts throughout the nation. I particularly invite your attention to the attachments for Exhibit 2 which mirror the severe restrictions now governing Service personnel in the use of electronic surveillance equipment.

Additionally, I am pleased at this time to advise the Subcommittee of the results of the inquiry of the special board convened in July of 1965 to investigate into instances of possible improper uses of electronic surveillance equipment by Service personnel.

The Board's findings confirm the matters developed before the Subcommittee. The board found that Service personnel in fact participated in improper uses of electronic surveillance equipment as stated above, and that such participation peaked in 1963. The board attributed the occurrences to misunderstanding of applicable directives and instructions; departures from the Service's normal line management direction and control; and overzealousness on the part of certain personnel engaged in the investigation of the criminal element. The board found that only two National Office supervisory employees had any knowledge of the proscribed practices. Also, the board found no evidence of improper use of electronic devices for surveillance purposes other than in cases where the individuals were engaged in criminal or illegal activities. The significance of this is that there is no indication of any spill-over to "ordinary audit cases." The board concluded, after examining all the factors surrounding the transgressions, that there is no basis for holding individual employees accountable and

that the Internal Revenue Service as an institution must bear the blame for what occurred.

Based on these findings, the board recommended—and I, as you have been apprised, have adopted—measures to assure that the unique set of circumstances which coincided to produce improper uses of electronic surveillance equipment prior to July of 1965, cannot recur within the Internal Revenue Service.

To correct the situation I issued unmistakably clear and detailed proscriptions on investigative techniques and set forth the Service's policy in drastic and unmistakable terms. Steps have also been taken to bring all facets of our investigative activity under the Service's normal National Office, Regional Office, and District Office system of direction and control. Countless conferences and meetings have been held, hammering home the absolute prohibitions on improper uses of electronic equipment. Acquisition of, and access to, such equipment has been severely restricted. And training in the use of such equipment—even for defensive purposes—has been suspended.

In sum, I am satisfied that those elements which led to improprieties prior to July of 1965 have been abolished. Further, the Service has continued to cooperate with the Department of Justice by referring to that agency information of the kind which is reflected in the Summary Statistics that make up Exhibit No. 1.

The information now furnished to the Subcommittee, supplemented by the vast quantity of information earlier submitted to the Subcommittee in open hearings, staff interviews and correspondence, rounds out the picture of the Service's eavesdropping activities in the past. With all due recognition of the desirability of revelations and remedial actions regarding the past, I must at this moment

turn my attention to the attitudes and activities of Service personnel today and in the future.

In the light of the information already furnished to the Subcommittee and the very restrictive measures we have taken in the area of eavesdropping, it may be that you are presently in a position to make fully informed findings and recommendations regarding the practices and procedures of the Internal Revenue Service. I would also hope that your reports to the Congress and to the people will recognize the very real distinctions between the way the Service operated prior to July of 1965 and the way the Service operates today.

With kind regards,

Sincerely,
Sheldon S. Cohen,
Commissioner

(Enclosures)

FOR ARGUMENT

No. 76-1309

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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UNITED STATES OF AMERICA, PETITIONER

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REPLY BRIEF FOR THE UNITED STATES

Respondent's brief rests upon the following propositions: (1) consensual monitoring implicates constitutionally protected privacy rights; (2) due process requires law enforcement agencies to self-regulate this investigative technique; (3) the provisions of the IRS Manual governing the use of consensual monitoring were promulgated pursuant to this constitutional requirement and were intended to accord judicially-enforceable rights to criminal defendants beyond those provided by the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*; and (4)

the proper remedy for non-compliance with these internal guidelines is suppression of the recordings. We have demonstrated in our opening brief that each of these contentions is unsound. In light of respondent's extended presentation, however, a few additional comments are in order.

1. The linchpin of respondent's argument (Br. 10, 14-23) is that consensual monitoring implicates privacy interests protected by the Fourth Amendment. This contention has been expressly rejected by this Court on a number of occasions. See *United States* v. *White*, 401 U.S. 745 (1971) (plurality opinion); *Lopez* v. *United States*, 373 U.S. 427 (1963); *On Lee* v. *United States*, 343 U.S. 747 (1952). See also *Hoffa* v. *United States*, 385 U.S. 293 (1966); *Rathbun* v. *United States*, 355 U.S. 107 (1957). A person can have no legitimate expectation that those to whom he confides details of wrongdoing will not reveal such communications to law enforcement officers. *United States* v. *White*, *supra*, 401 U.S. at 752; *Hoffa* v. *United States*, *supra*, 385 U.S. at 302. This is especially true where, as here, the incriminating statements are made directly to a governmental officer. See *Osborn* v. *United States*, 385 U.S. 323, 327 n.4 (1966). Moreover, "[i]f the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent * * * to whom the defendant is talking and whose trustworthiness the defendant necessarily risks." *United States* v. *White*, *supra*, 401 U.S. at 751.

Nor is there even a shred of support for respondent's related assertion (Br. 10) that investigative agencies must adopt procedures regulating the use of consensual monitoring in order to satisfy the reasonableness requirement of the Fourth Amendment. In none of the decisions upholding the permissibility of consensual monitoring has this or any other Court ever suggested that such internal guidelines are constitutionally required. Cases such as *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), and *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), on which respondent relies, are wholly inapposite. There, the Court looked to the existence of and compliance with administrative regulations in determining whether the search in question satisfied the Fourth Amendment, but only because the search would have been constitutional if carried out for one purpose but unconstitutional if carried out for another. In *Opperman*, for example, the Court sustained the warrantless search of an impounded automobile because it had occurred for caretaking purposes, in accordance with standard police procedures, rather than for investigatory purposes. 428 U.S. at 369, 375-376. The published regulations of the Vermillion police department served to confirm that the intrusion had occurred for a legitimate rather than an illegitimate reason. Consensual monitoring, by contrast, does not constitute an invasion of any constitutionally justifi-

able expectation of privacy, and hence does not involve any interest protected by the Fourth Amendment (*United States* v. *White*, *supra*, 401 U.S. at 749), regardless of the purpose for which it is carried out.

We do not contend, of course, that a government agency is free to publish and then to disregard its internal regulations at will. The relevant inquiry, however, is one under the Due Process Clause of the Fifth Amendment, not the Reasonableness Clause of the Fourth Amendment, to determine whether the government conduct in question has treated a particular defendant unfairly. Respondent would pretermit this inquiry entirely, preferring instead to ask only whether a government regulation has been violated. In respondent's view, repeated throughout his brief (Br. 42, 46, 49, 59), once an agency has chosen to adopt mandatory internal operating procedures "rather than mere precatory guidelines or policy statements" (Br. 42), *any* violation of those procedures constitutes a violation of due process of law. "Where the government has adopted procedural protections * * * and its agents have failed to obey such commands," he argues (Br. 46), "the difficult task of judicially balancing the interests is unnecessary. Whatever judgment the court might reach in weighing the competing considerations on its own is preempted by the judgment of the agency."

Once again, respondent's far-reaching assertion finds no support in this Court's decisions and has little to commend it. To the contrary, the Court has

stressed the necessity for a case-by-case analysis to determine whether alleged government misconduct has deprived a defendant of due process of law. "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the *defendant*." *Hampton* v. *United States*, 425 U.S. 484, 490 (1976) (plurality opinion; emphasis in original). We have identified and discussed a number of the factors crucial to this individualized determination in our opening brief (pages 27-33) and have shown that respondent's conduct could not have been affected by the agents' failure to comply with the IRS Manual and, indeed, that even complete compliance with the Manual would not have influenced the agency's ultimate decision to employ consensual monitoring in respondent's case. Respondent has not challenged either of these conclusions.[1] In these circumstances, short of adopt-

[1] Respondent does allege (Br. 62-63), however, that Agent Yee and Inspector Hill intentionally violated the IRS regulations. This conclusion was not adopted by either court below and, as we pointed out in our opening brief (pages 16-17 n.4), it is not supported by the record. It is undisputed that Inspector Hill attempted to comply with the regulations by submitting the necessary documents to the IRS National Office on January 30 or 31, 1974 (A. 34-37, 63-67) and that the Director of the Internal Security Division granted approval for the monitorings prior to the January 31 and February 6 meetings (A. 34, 37, 41-42, 68, 70-72). Indeed, in view of the virtual certainty that consensual monitoring of these meetings would have been authorized in this case because of respondent's bribe attempts, respondent can offer no reason why the agents would have had a motive to evade the internal

ing respondent's *per se* rule that every time an agency violates its internal regulations it violates due process, it is difficult to understand in what manner respondent has been treated unfairly, much less why the highly probative tape recordings of his bribe offers to Agent Yee should have been suppressed.[2]

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guidelines (see A. 42). (In this regard, we have been informed by the IRS that Inspector Hill and Agent Yee obtained approval from the Department of Justice to engage in the consensual recording of respondent's conversations with Agent Yee on March 25, 1974, and that that approval was extended by the Assistant Attorney General on April 24, 1974, May 24, 1974, June 27, 1974, July 23, 1974, and August 29, 1974 (A. 78). However, none of respondent's conversations was overheard during this period.)

In any event, as the Court remarked of the due process claim in *United States* v. *Agurs*, 427 U.S. 97, 110 (1976), "the constitutional obligation is [not] measured by the moral culpability, or the willfulness, of the prosecutor. * * * If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." While a showing of bad faith on the part of the government may be *necessary* before sanctions such as suppression may be imposed, such a showing is not *sufficient* to justify the imposition of sanctions; rather, it is "proof of actual prejudice [to the defendant that] makes a due process claim concrete and ripe for adjudication * * *." *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977). Respondent has failed to demonstrate any prejudice as a result of the violation here.

[2] Respondent's assertion (Br. 15; see also Br. 18) that this is a case of "unrestrained and indiscriminate consensual electronic eavesdropping and monitoring, unrelated to the investigation of persons properly suspected of criminal activity" can only be described as ludicrous. Agent Yee and Inspector Hill did not engage in any monitoring on their own say-so, and it is hard to imagine a clearer case for utilization of consensual monitoring as a law enforcement technique. As noted above and in our opening brief, each of the consensual

2. Relying upon legislative history that was instrumental in prompting adoption of the IRS regulations governing consensual monitoring, respondent urges (Br. 35-38) that the administrative procedures outlined in the IRS Manual were specifically formulated to protect the rights of individual citizens. We do not dispute that the regulations were adopted, among other reasons, out of concern that the uncontrolled use of electronic eavesdropping devices, even with the consent of a party to the con-

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recordings at issue here was approved by the Director of the IRS Internal Security Division, and the February 11 recording was also authorized in advance by the appropriate officials in the Department of Justice in full compliance with the IRS Manual and the Attorney General's Memorandum (A. 39-40, 42, 73-75, 77-79). Furthermore, respondent's offer of a "personal settlement" to Agent Yee in March 1974 and January 1975 unquestionably made him a proper subject of criminal investigation. From the earliest promulgation of its regulations governing consensual monitoring, in June 1965, the IRS has viewed cases involving the attempted bribery of Service employees as the most justifiable use of electronic recording devices (App., *infra*, p. 2a).

Nor can respondent find assistance for his due process claim in "vagueness" cases (Br. 10) striking down "law[s] that fail[] to define clearly the standard of conduct to which private citizens are to be held * * *." It is of course true that "[a] criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). But the IRS regulations apply only to government employees and do not require private citizens to take or refrain from any action. (On the other hand, there can be little doubt that respondent was well aware that his attempts to bribe Agent Yee violated the criminal laws.)

versation, could lead to abuses. See *Hearings on Invasions of Privacy Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 1276 (1965) (hereafter cited as *Privacy Hearings*). However, neither the Senate Subcommittee Hearings to which respondent extensively alludes, nor the successive versions of the IRS regulations governing employment of consensual monitoring devices, lend any support to his contention that the purpose of the regulations was to establish a system of enforceable rights for the express benefit of potential targets of an investigation. Indeed, an examination of these authorities confirms the view expressed in our opening brief that the principal objective of the internal guidelines was self-policing.

Respondent correctly notes (Br. 35) that regulations governing the use of consensual monitoring devices were promulgated by the IRS prior to those adopted in compliance with the Attorney General's October 1972 Memorandum. On June 29, 1965, the Commissioner of Internal Revenue, responding to the Senate Subcommittee's concerns about unchecked wiretapping and eavesdropping, issued a policy letter that established procedures restricting the utilization of potentially intrusive monitoring equipment (App., *infra*, pp. 1a-4a).[3] The letter explained that

[3] The guidelines contained in this letter were subsequently promulgated as IRS Policy Statement P-4200-1. These guidelines, as revised on March 9, 1967, required approval of a supervisory official as a condition to employment of electronic devices in conducting consensual monitoring. Thereafter, to

the purpose of the procedures was to minimize "[t]he * * * suspicion of the law enforcement activity which arises from the indiscriminate use of this equipment" by limiting its use "to those circumstances where it is the only reasonable means to the successful completion of the investigation." See *Privacy Hearings* 1127.

While the Subcommittee's members had focused their attention principally upon forms of nonconsensual surveillance (see, *e.g.*, *Privacy Hearings* 1146, 1212, 1249, 1260, 1262), they also had voiced the expectation that consensual monitoring techniques would not be employed indiscriminately. Several members observed that overuse would tend to bring the IRS into disrepute and that constraints upon the practice were essential to improve the agency's image and to enhance its credibility in dealing with the public (see, *e.g.*, *Privacy Hearings* 1276 (remarks of Sen. Long)). Thus, while both the Commissioner and the Senate Subcommittee were not insensitive to the privacy interests potentially involved, their objective in establishing an internal system of self-policing was to protect the public as a whole, not the particular individual whose conversations were monitored, and to engender confidence in and respect for the agency. This intent is corroborated by the fact that both the Senate Subcom-

comply with the requirements of the Attorney General's Memorandum, the guidelines were further revised to require Justice Department approval in non-emergency situations. See IRS Manual ¶ 652.22.

mittee and successive versions of the IRS regulations contemplated administrative discipline of the offending agent rather than individualized judicial remedies for the target of the surveillance as the sanction for violation of the regulations (see *Privacy Hearings* 934, 1127; *Oversight Hearings Into the Operations of the IRS Before a Subcommittee of the House Committee on Government Operations*, 94th Cong., 1st Sess. 401, 450-454 (1975) (hereafter cited as *Oversight Hearings*)).[4]

Indeed, respondent's argument itself proves this point. As he recognizes (Br. 33-34), the IRS regulations not only list the procedures for obtaining authorization for consensual monitoring, but also set forth a comprehensive scheme governing access to electronic surveillance equipment, accountability for its custody and movement, inventory procedures, and reporting requirements detailing its use. See IRS Manual ¶ 652.4(1)-(7) (Resp. App. 18-20); see also Memorandum of the Attorney General (Govt. App. 1a, 8a-9a). It certainly cannot be contended that these provisions were meant to be anything more

[4] Moreover, the Attorney General's Memorandum requires that where emergency circumstances compel consensual monitoring without advance authorization from the Department of Justice, the monitoring agency must promptly notify the Attorney General or his designee of the incident and of the reasons that precluded obtaining advance approval. This requirement also suggests that the purpose of the regulatory scheme was to establish an internal policing system rather than an enforceable procedure for safeguarding the interests of private citizens, since targets of surveillance would derive no direct benefit from such after-the-fact reporting.

than an internal "housekeeping" system, much less that the failure to follow these provisions would violate due process.

This background places this case in marked contrast to *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and the other cases on which respondent relies (Br. 43-45). The procedures involved in *Accardi* were expressly and clearly designed to protect individual aliens against arbitrary deportation determinations by requiring impartial review by an administrative tribunal, and circumvention of those procedures deprived the intended beneficiaries of important administrative safeguards. See also *Yellin* v. *United States*, 374 U.S. 109, 115 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535, 540 (1959); *Service* v. *Dulles*, 354 U.S. 363, 373 (1957); *Antonuk* v. *United States*, 445 F.2d 592 (6th Cir. 1971) (Army reservist activation regulations intended to accord procedural rights to individual service mmebers). The IRS Manual, on the other hand, was designed to enhance the integrity of the agency's investigative processes in general rather than to confer benefits on particular individuals.[5]

[5] Respondent erroneously cites (Br. 45 n.19) *Bridges* v. *Wixon*, 326 U.S. 135 (1945), as an instance in which the Court has enforced internal regulations applicable at the investigative, rather than at the administrative, stage of agency proceedings. In *Bridges* the Court held inadmissible an unsworn, unsigned statement at a deportation hearing because regulations of the Immigration and Naturalization Service specifically precluded the receipt of such evidence. This determination was not predicated on the fact that the statement had been improperly taken. Rather, it was com-

Finally, respondent appears to contend (Br. 51, 52 n.23) that the only reason Congress refrained from enacting a statute covering consensual monitor-

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pelled because the INS rule, as the Court noted, was "designed to protect the interests of the alien and to afford him due process of law" (*id.* at 152) by rendering inadmissible unreliable evidence. Moreover, the government conceded that the evidence should not have been admitted at the hearing and argued only that any objection had been waived (*ibid.*).

Respondent's attempts (Br. 40-41 & n.18) to distinguish *Rinaldi* v. *United States*, 434 U.S. 22 (1977), and the consistent judicial refusals to enforce the "*Petite* policy" over the government's objections are similarly unpersuasive. Respondent contends that "[t]he need to enforce the [*Petite*] policy over the Department's protest * * * never arises" because the Attorney General either can move to dismiss the prosecution or can grant *nunc pro tunc* authorization. But the cases in which *Petite* authorization has been granted *after* conviction all involved a violation of the *Petite* policy, since the policy (like the IRS Manual provisions at issue in this case) requires *prior* approval of the Attorney General. Insistence upon prior authorization is important in *Petite* situations because otherwise some defendants already subjected to a state prosecution might have to undergo an unnecessary federal trial for the same criminal act, a harm that cannot be undone simply by reversing any resulting conviction. Nonetheless, the courts have refused to afford relief because of the violation.

In the present case, as in a number of *Petite* situations, the Department of Justice has granted after-the-fact approval to the consensual monitoring engaged in by the IRS, both by authorizing the February 11 monitoring in advance, with full knowledge of the previous recording of respondent's conversations with Agent Yee (A. 75-76), and by vigorously opposing respondent's motion to suppress. As in the *Petite* situation, this *nunc pro tunc* authorization should dispose of any claim that the IRS's failure to comply precisely with its internal regulations prejudiced respondent or entitles him to judicial relief over the government's objections.

ing is because the Commissioner of Internal Revenue requested that the IRS instead be permitted to adopt internal regulations. This contention is not substantiated by the legislative history he cites.

To begin with, during the Senate Subcommittee Hearings the Commissioner simply outlined measures taken within the agency to regulate electronic surveillance. He did not suggest that such regulations should supplant possible legislation in the area, nor did the Subcommittee evidence any predisposition to propose legislation governing consensual monitoring. The bill that the Subcommittee ultimately proposed specifically exempted consensual monitoring from its proscriptions. S. 928, 90th Cong., 1st Sess. § 2511 (a) (1967). The reason for this exemption is that the legislation was a response to several court decisions, principally *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967), that had restricted the availability of *non-consensual* electronic surveillance as a law enforcement technique. See *United States* v. *United States District Court*, 407 U.S. 297, 302 (1972). This Court, however, had held *consensual* monitoring to be constitutionally permissible, and, hence, the Subcommittee had no need to address the matter. See *Hearings on the Right of Privacy Act of 1967 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 49, 61, 159 n.1 (1967). Title III, which was enacted in place of S. 928, contains a similar section specifically excluding consensual monitoring from its provisions. 18 U.S.C. 2511(2)

(c). This limitation was also the result of judicial decisions holding that such monitoring did not violate the Fourth Amendment, rather than reliance upon the promises of government agencies to police these practices through adoption and enforcement of internal regulations. S. Rep. No. 1097, 90th Cong., 2d Sess. 93-94 (1968).

Similarly, the 1975 testimony of the Deputy Commissioner of Internal Revenue before the House Subcommittee (cited at Resp. Br. 52) was limited to delineating ongoing and contemplated programs governing regulation of electronic surveillance techniques. Again, there was no discussion whether such programs should take the place of legislation. *Oversight Hearings* 448-455. Moreover, there is no relationship between this Subcommittee's concern with IRS surveillance practices and several earlier proposals (see Resp. Br. 52 n.23) introduced in the House of Representatives to prohibit warrantless interceptions in the absence of consent from all parties to the conversation. H.R. 9698, 93d Cong., 1st Sess. (1973), H.R. 9667, 93d Cong., 1st Sess. (1973), and H.R. 1008, 93d Cong., 1st Sess. (1973), were introduced in reaction to revelations that the *White House* had routinely recorded telephone conversations during the Nixon Administration. See 119 Cong. Rec. 27048 (1973) (remarks of Rep. Abzug); 119 Cong. Rec. 26637 (1973) (remarks of Rep. Long).[6]

[6] We do not wish to suggest by this extended discussion that the propriety of the district court's suppression order turns on an analysis of the background of IRS Manual ¶ 652.22. The key considerations remain whether the violation of the regulation prejudiced respondent and whether it is legitimate to impose the harsh remedy of an exclusionary rule. Of course, it further diminishes any notion of prejudice to respondent to demonstrate, as we have above and in our opening brief, that the IRS guidelines are quite distinguishable from the agency regulations involved in cases like *Accardi*.

3. Citing the results of a 1974 IRS audit of electronic eavesdropping and monitoring conducted within the IRS Intelligence Division, respondent asserts (Br. 60-62) that violations of IRS regulations are widespread and that application of an exclusionary rule as a prophylactic measure is warranted. Although respondent states that this survey revealed that 18 agents had conducted unauthorized monitoring during 1973,[7] he fails to note that during this period the IRS employed some 2,700 agents who potentially had access to these investigative techniques. *Oversight Hearings* 412, 455. Hence, the data hardly suggest evasion of the internal guidelines or abuses so widespread that judicial intervention is required. In any event, even if the violation of internal regulations would ever warrant blanket imposition of an exclusionary rule, a proposition we doubt, it is unnecessary for the courts to fashion a suppression remedy for violations of the IRS Manual since the Manual itself expressly provides the remedy

[7] Twelve of these cases involved the recording of conversations without advance approval within the IRS. In three instances the agents failed to obtain the authorization of the Attorney General, and in three other instances the monitoring exceeded the authorizations because an unexpected person was involved in the conversation. *Oversight Hearings* 451.

of disciplinary sanctions in appropriate cases. Cf. *United States* v. *Babcock*, 250 U.S. 328, 331 (1919).

Respondent contends, however, that dismissal is the only disciplinary sanction likely to have any deterrent effect and asserts that "the IRS's record of imposing disciplinary sanctions for violation of its electronic eavesdropping and monitoring rules has not been impressive" (Br. 59 n.25).[8] Both statements are incorrect. The IRS Manual provides for a spectrum of disciplinary measures for violations of its procedures, including removal, suspension or furlough without pay, reduction in grade or compensation, and reprimand or admonition. *Oversight Hearings* 453, citing IRS Manual ¶¶ 1982.3-1982.8. It cannot seriously be disputed that the possibility of loss of earnings, job status, and advancement potential constitutes as genuine a deterrent to unauthorized monitoring as the exclusion of evidence. Nor is there any substance to respondent's claim that the IRS typically disregards violations by failing to impose sanctions. Following disclosures of unauthorized monitoring during the 1974 IRS internal audit, each of the incidents was fully investigated and sanctions were imposed. Penalties ranged from five days' suspension to oral admonishment.[9] *Oversight Hearings* 399-411, 451.

[8] Respondent also urges (Br. 59 n.25) that, at all events, a disciplinary remedy is inadequate since, in contrast to the exclusionary remedy, it does not vest "aggrieved" persons with an invokable remedy. However, this argument misperceives the purpose of the exclusionary rule, which is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

Finally, respondent misconstrues our position that extension of the exclusionary rule to internal agency guidelines is potentially counterproductive. We have not contended, as respondent represents (Br. 57), that "if evidence acquired in violation of agency regulations is excluded, the agencies will repeal their rules." Nor do we suggest that the IRS is likely to terminate its successful program of self-policing of consensual monitoring. But it would be foolish to suppose that if the harsh sanction of suppression is imposed by courts to punish government agencies for their failure to follow self-imposed guidelines in instances, such as this case, where the violation did not prejudice the defendant, it would not tend to encourage the modification of a great many current regulations and to discourage the adoption of regulations in the future. The result would be unfortunate, since internal guidelines diminish the likelihood of arbitrary governmental action and protect societal or individual interests that, while not warranting constitutional or statutory protection, are nonetheless important.

[9] More specifically, one employee was suspended, three received written reprimands, three received oral admonishments confirmed in writing, seven received oral admonishments, and one retired before disciplinary action could be taken. No action was deemed warranted in the other three cases.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

APPENDIX

SPECIAL MESSAGE

From the Commissioner

[SEAL]

Washington, D.C.

June 29, 1965

TO ALL CRIMINAL INVESTIGATIVE PERSONNEL:

I am writing to you both officially and personally. Recently, serious allegations have been made by a Congressional Subcommittee concerning improper use of investigative equipment. On June 17, I signed the following policy statement concerning the proper use of investigative methods and equipment:

> The statutory duty of the Internal Revenue Service is to administer the Internal Revenue laws. It is the policy of the Service to perform this work fairly and impartially. Administration should be both reasonable and vigorous. A highly important part of administration of the Internal Revenue laws is the bringing to justice of willful offenders of those laws. *Of equal importance in the administration of these laws is the observance of the highest level of integrity by Service personnel in carrying out their duties. The constitutional rights and other legal rights of all persons will be fully respected and observed.* While acting at all times within the bounds of law, the methods which the Service should use in investigating violations of law

will vary with the circumstances. (Emphasis added)

These principles are especially pertinent with respect to the use of certain investigative equipment. The discredit and suspicion of the law enforcement activity which arises from the indiscriminate use of this equipment requires that its use be restricted to those circumstances where it is the only reasonable means to the successful completion of the investigation. Accordingly, the use of this equipment by investigative personnel will be subject to the prior approval of a designated official of the Service. Normally, this approval will be extended only in cases involving (1) violations of the public trust by Service employees, (2) the attempted bribery or corruption of Service employees, or (3) suspected or known members of the criminal element. In no event should there be permanent installations of this type of equipment in any Internal Revenue office.

The Assistant Commissioner (Compliance) and the Assistant Commissioner (Inspection) will take such steps as may be necessary to assure application of this policy.

As indicated in the policy statement, the Assistant Commissioners Compliance and Inspection will be taking further action to implement this policy. However, your assistance and understanding are the key to successful implementation. I am sure you are keenly aware of the need to both vigorously pursue violators of our tax laws and to assure that the rights of those investigated are in no way abridged. However, there may be those among us who, in attempting vigorous pursuit of offenders of our nation's laws, minimize their own corollary responsibility to observe these very laws and Service policy. This may be especially true when working with local law enforcement organizations not having a policy as clearly defined as does the Service.

So that no misunderstanding exists—the use of illegal wiretaps is unconditionally prohibited, as is a deliberate making of an unreasonable search or seizure. This prohibition includes the use of information obtained by anyone, government or private, through wiretaps. Tainted evidence is inadmissible in court. Use of tainted information is unacceptable as an investigative technique whether or not divulgence is made.

The Service policy to fully respect and observe the constitutional and other legal rights of all persons will be strictly enforced. I want every employee to be on notice that anyone who knowingly violates or in any way knowingly countenances violation of this policy will be subject to disciplinary action and may be removed from the Service. I hope that such action is never necessary but it is only with your thorough understanding and cooperation that we can protect the integrity and reputation of our Service.

To insure this understanding, I have directed that a file be maintained in the National Office containing the signed acknowledgment of this directive by each criminal investigative employee and each supervisory or managerial official responsible for directing the activities of such employees. Such acknowledgment

will include district, regional and National Office personnel and will be supplemented as each new employee of this category is added to the rolls.

Sincerely,

/s/ Sheldon S. Cohen
Commissioner

INTERNAL REVENUE SERVICE

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